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No. 10950 2404

United States
Circuit Court of Appeals
For the Ninth Circuit.

CONTRACTORS, PACIFIC NAVAL AIR BASES and LIBERTY MUTUAL INSURANCE COMPANY, a Corporation,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, United States Employees' Compensation Commission for the Thirteenth Compensation District and WILLIAM DONOHO,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

FILED
JAN 18 1945
PAUL P. O'BRIEN,
CLERK

Rotary Colorprint, 55 Eleventh Street, San Francisco

No. 10950

United States

Circuit Court of Appeals

For the Ninth Circuit.

CONTRACTORS, PACIFIC NAVAL AIR BASES and LIBERTY MUTUAL INSURANCE COMPANY, a Corporation,

Appellants,

vs.

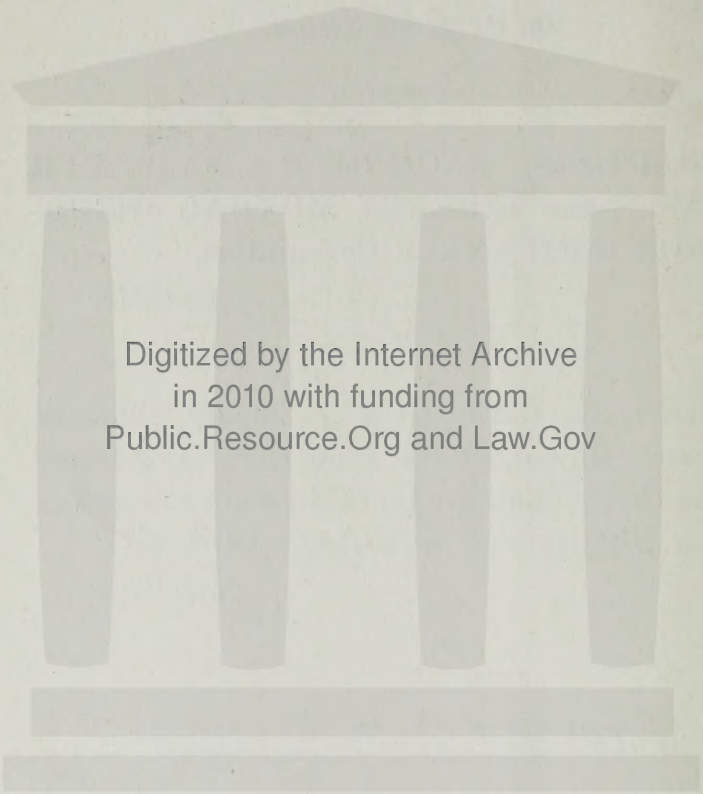
WARREN H. PILLSBURY, Deputy Commissioner, United States Employees' Compensation Commission for the Thirteenth Compensation District and WILLIAM DONOHO,

Appellees.

Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

MR. CLAUDE R. WEINGAND,

939 Rowan Building,
Los Angeles, California

Attorney for Complainants and Appellants.

MR. FRANK J. HENNESSY,

United States Attorney,
Northern District of California,
Post Office Building,
San Francisco, California.

Attorney for Respondents and Appellees.

In the District Court of the United States,
Northern District of California,
Southern Division.

No. 23225-S

CONTRACTORS, PACIFIC NAVAL AIR BASES, and LIBERTY MUTUAL INSURANCE COMPANY, a corporation,

Complainants,

vs.

WARREN H. PILLSBURY, DEPUTY COMMISSIONER, UNITED STATES EMPLOYERS' COMPENSATION COMMISSION FOR THE THIRTEENTH COMPENSATION DISTRICT, and WILLIAM DONOHO,

Respondents.

COMPLAINT FOR INJUNCTION

Complainants complain of Respondents above named and allege as follows:

I.

That complainant Contractors, Pacific Naval Air Bases, are, and at all the times herein mentioned have been joint venturers consisting of Hawaiian Dredging Company, Ltd., a corporation, Raymond Concrete Pile Company, a ocrporation, Turner Construction Company, a corporation, Morrison-Knudsen Company, Inc., a corporation, J. H. Pomeroy & Company, Inc., a corporation, W. A. Bechtel Company, Inc., a corporation, Utah Construction Company, Inc., a corporation, and John E. Byrne,

doing business as Byrne Organization, all doing business under the firm name and style of Contractors, Pacific Naval Air Bases. (Said joint venturers will hereinafter be referred, collectively, as "Contractors, Pacific Naval Air Bases".)

II.

That the Liberty Mutual Insurance Company, a corporation, is a corporation duly organized and existing under the laws of the State of Massachusetts, with offices in Los [1*] Angeles, California.

III.

That Respondent Warren H. Pillsbury is, and at all the times herein mentioned has been, Deputy Commissioner of the United States Employees' Compensation Commission for the Thirteenth Compensation District, which includes the State of California, and as such has been, and is, administering the provisions of the Longshoremen's and Harbor Workers' Compensation act, (Public 803—69th Congress) and Acts amendatory thereto extending the application of said Longshoremen's and Harbor Workers' Act to accidents occurring to persons employed at or in connection with air, military and/or naval bases outside the continental limits of the United States.

IV.

That commencing with the month of February to and including the month of September, 1942, the Respondent William Donoho was in the employ

*Page numbering appearing at foot of page of original certified Transcript of Record.

of complainant Contractors, Pacific Naval Air Bases as a male nurse on a construction job on Pacific Islands outside of the continental limits of the United States.

V.

That at said time and place said employer was insured against liability under said Compensation Act and amendments thereto by complainant Liberty Mutual Insurance Company, a corporation.

VI.

That on or about September 17, 1943 Respondent William Donoho filed his claim for compensation with Respondent Pillsbury, as Deputy Commissioner, claiming to have contracted tuberculosis resulting from conditions of employment including infectiousness of fellow-workers while Respondent Donoho was employed as male nurse and steward with Contractors, Pacific Naval Air Bases on the Island of Samoa. [2]

That said matter, being placed in issue by the Answer of Complainants herein, was thereafter heard before said Pillsbury, as Deputy Commissioner, and said Pillsbury on the 24th day of February, 1944 made an order awarding Respondent Donoho compensation and filed his decision entitled "Compensation Order Award of Compensation" in words and figures as follows; to-wit:

Claim for compensation having been filed herein under the Act of Congress of August 16, 1941, for an injury occurring in the course of employment on a military, air or naval base of the United States

outside the continental United States, in the Pacific Compensation District, in the Territory of Hawaii, and said claim having been transferred to the undersigned Deputy Commissioner, 13th Compensation District, by the Deputy Commissioner of said Pacific Compensation District, with the approval of the United States Employees' Compensation Commission, and such investigation in respect to the above entitled claim having been made as is considered necessary and a hearing having been duly held in comformity with law, the Deputy Commissioner makes the following.

FINDINGS OF FACT

That between March and September, 1942, the claimant above named was in the employ of the employer above named for the performance of service at a military base in a possession of the United States in the South Pacific region, in the Pacific Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act as extended by siad Act of Congress of August 16, 1941, and that the liability of the employer for compensation under said Acts was insured by Liberty Mutual Insurance Company.

[3]

That while employed on said base claimant contracted an active pulmonary tuberculosis as a result of conditions of his employment as follows: Upon arriving at the base in March 19, 1942, claimant worked a short time as a male nurse. When the

work was taken over by military authorities claimant worked for some weeks driving a truck. In the course of this work during the rainy season which prevailed at that time, he was wet through four or five times a day by rain. After some weeks he was assigned to work as a steward of the mess hall and continued in such capacity until he left the base in September. During this time he worked at least 12 hours a day and at times sixteen to eighteen hours a day. The temperature at said base was between 90 and 100 degrees with high humidity most of the time. After working at said base two or three months he commenced to feel great fatigue which has continued from that time. He arrived at California after completion of this contract on September 25, 1942 and has done no work since because of said fatigue. In the Spring of 1943 he was examined for military service at which time he was found to be suffering from active pulmonary tuberculosis and was put in a hospital shortly afterwards. He is still hospitalized at the present time. That said active tuberculosis was caused to develop and become disabling either by contraction of original infection from unknown sources or by reactivation of a previous undiscovered and arrested pulmonary tuberculosis, by conditions of his employment above mentioned, principally overwork and exposure;

That defendants had notice of claimant's contention within proper time; [4]

That the employer did not furnish claimant with medical treatment, etc., in accordance with Section

7(a) of the said Act, after being notified of its discovery;

That claimant was thereafter hospitalized in the Los Angeles County tuberculosis hospital at Olive View;

That defendants are liable for the reasonable cost of said care, if charge be made therefor, the amount to be fixed by further proceedings if the parties are unable to agree thereon;

That the average annual earnings of the claimant herein at the time of his injury exceeded the maximum sum prescribed by said Act of $1950.00, his actual earnings in said employment being $85.00 a week;

That as the result of the injury sustained the claimant was wholly disabled from September 25, 1942 indefinitely, and he is entitled to compensation at $25.00 a week for such disability to and including the date of the hearing, October 6, 1943, 53 6/7 weeks, amounting to $1346.42, and thereafter at said rate until the termination of his disability or other further order of the Deputy Commissioner. That no compensation has been paid;

Upon the foregoing facts, the Deputy Commission makes the following:

AWARD

That the employer, Contractors, Pacific Naval Air Bases, and the insurance carrier, Liberty Mutual Insurance Company, shall pay to the claimant compensation as follows: The sum of $1346.42 forthwith, as of October 6, 1943, and the further

sum to claimant of $25.00 a week thereafter, payable in installments each two weeks until the further order of the Deputy Commissioner. [5]

Given under my hand at San Francisco, California, this 24th day of February, 1942.

WARREN H. PILLSBURY
Deputy Commisisoner
13th Compensation District."

VII.

That no proceedings for the suspension *of* setting aside of said Compensation Order filed February 24, 1944 have ever been instituted as provided in subdivision (b) of Section 921 of said Act, or elsewhere or at all. That under the provisions of said Act the said Order became effective when filed on February 24, 1944 and except for these proceedings to suspend or set aside said Order would become final at the expiration of thirty days after said February 24, 1944.

VIII.

That said Compensation Order is not in accord with law in the following particulars:

(a) That there was no substantial evidence to warrant the Findings of Fact in said order that said respondent Donoho while employed, as in said Compensation Order alleged, contracted pulmonary tuberculosis as a result of conditions of his employment.

(b) That there is no substantial evidence to support the Findings of Fact that claimant is entitled

to compensation at the rate of $25.00 per week or any other rate.

(c) That said Finding of Fact, and particularly those portions thereof which read: "That said active tuberculosis was caused to develop and became disabling either by contraction of original infection from unknown sources or by reactivation of a previous undiscovered and arrested pulmonary tuberculosis, by conditions of his employment above mentioned, [6] principally overwork and exposure" do not support the Award of Compensation made in said Compensation Order.

Complainants are informed and believe and on such information and belief allege that Respondent Donoho will be unable to pay to complainants herein the amounts which complainants are required to pay by reason of said award and that unless the enforcement of said Award be stayed by injunction herein complainants will suffer irreparable damage and injury.

IX.

That the complainants have no adequate nor any remedy other than by these proceedings which are brought pursuant to the provisions of Section 921 of said Act and Section 1653, Subdivision (b) of the Defense Bases Act, which provide that if not in accordance with law a compensation order may be suspended or set aside in whole or in part through injunction proceedings brought by any party in interest against the Deputy Commissioner making the order and instituted in the District

Court of the judicial district wherein is located the office of the Deputy Commissioner whose compensation order is involved if his office is located in a judicial District and that proceedings for suspending or setting aside of compensation orders whether revoking a claim or making an award shall not be instituted otherwise than as provided in said Section 921 and 1653, subdivision (b).

X.

That all of said proceedings before the said Deputy Pillsbury are contained in a file of said Deputy Commissioner under Claim Number DB-P-1-8359, together with the testimony of all witnesses taken before the said Deputy Commissioner in connection with said alleged injury of said Donoho. [7]

That the Deputy Commissioner should be required to file with the clerk of this court, at a time to be fixed by the court, a certified copy of all proceedings had before him, together with all exhibits, transcripts of testimony, letters and documents of every nature and description received by said Deputy Commissioner in consideration of said claim.

Wherefore, complainants pray that process in due form of law according to the course of this Honorable Court may issue and that respondents may be cited to appear and answer all and singular the matters hereinbefore set forth and that the order of said Deputy Commissioner filed February 24, 1944 be set aside and declared a nullity and that a mandatory injunction be issued herein—setting aside and restraining enforcement of said purported

order dated February 24, 1944, and that the respondents be permanently enjoined from making or attempting to make any further orders with respect to said proceeding; that pending the hearing of the cause or in less than three days notice to the parties interested and the Deputy Commissioner, this Honorable Court issue an interlocutory injunction allowing the stay of such payments pending the determination of this cause; and for such other further and different relief as to the Court may seem justified, and for costs incurred herein.

CLAUDE F. WEINGAND
Attorney for Complainants.

[8]

State of California,
County of Los Angeles—ss.

Claude F. Weingand being first duly sworn, on behalf of the above named complainants, deposes and says: That he is attorney for the above named complainants; that he has read the foregoing complaint for injunction and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters that he believes it to be true;

That the reason this verification is made by this affiant instead of an officer of said complainants is that there is no officer present within the County of Los Angeles of either of said complainants to

make the verification for and on behalf of said complainants.

CLAUDE F. WEINGAND

Subscribed and sworn to before me this 22nd day of March, 1944.

(Notarial Seal) BETTY JANE SMOCK

Notary Public in and for said County and State.

My Commission Expires July 8, 1947.

[Endorsed]: Filed Mar 24, 1944. [9]

[Title of District Court and Cause.]

MOTION TO DISMISS BILL OF COMPLAINT

Comes now Frank J. Hennessy, United States Attorney, on behalf of respondent Deputy Commissioner Warren H. Pillsbury, and moves the court to dismiss the Bill of Complaint on file herein on the following grounds:

I.

That the Bill of Complaint herein filed be dismissed for want of allegations showing that complainants are entitled to the relief prayed for;

II.

That the Bill of Complaint on file herein be dismissed in that

(1) It does not appear from the face of said Bill of Complaint in what manner the Findings of

Fact heretofore made by Respondent Pillsbury are not supported by substantial evidence;

(2) It does not appear from the face of said Bill of Complaint in what manner the Compensation Award made by Respondent Pillsbury is not supported by substantial evidence;

(3) It does not appear from the face of said Bill of Complaint in what manner the Compensation Order made by Respondent Pillsbury is contrary to law.

Wherefore, Respondent Pillsbury prays that his Motion to Dismiss be granted and that said Bill of Complaint be dismissed and for such other relief that he may be entitled to receive in the premises.

FRANK J. HENNESSY
United States Attorney

(Acknowledgment of receipt of copy.)

[Endorsed]: Filed Jul 6 1944 [10]

In the United States District Court, for the Northern District of California, Southern Division.

No. 23,225-S

CONTRACTORS, PACIFIC NAVAL AIR-BASES and LIBERTY MUTUAL INSURANCE COMPANY, a corporation,

Complainants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, United States Employees Compensation Commission for the Thirteenth Compensation District, and WILLIAM DONOHO,

Respondents.

ORDER DISMISSING BILL

Ordered:

1. The prayer of complainants' complaint for injunction is denied.

2. Respondents' motion to dismiss the bill of complaint is granted.

Dated: September 13, 1944.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed Sep 13 1944. [11]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Respondents, Warren H. Pillsbury, Deputy Commissioner, United States Employees Com-

pensation Commission for the Thirteenth District, William Donoho and Frank J. Hennessy, Attorney for Respondent, Warren H. Pillsbury:

Notice Is Hereby Given that Contractors, Pacific Naval Air Bases and Liberty Mutual Insurance Company, a corporation, complainants in the above entitled action in the above entitled cause, do hereby appeal to the United States Circuit Court of [12] Appeal for the Ninth Circuit from the Order and Judgment of Dismissal entered in the within action on or about the 13th day of September, 1944.

Dated this 25th day of October, 1944.

CLAUDE F. WEINGAND
Attorney for Complainants.

[Endorsed]: Filed Nov 16 1944. [13]

[Title of District Court and Cause.]

Premium charged for this bond is $10.00 Dollars per annum.

UNDERTAKING FOR COSTS ON APPEAL

Know All Men By These Presents, that the Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto Warren H. Pillsbury, Deputy Commissioner, United States Employees Compensation Commission for the Thirteenth Compensa-

tion District, and William Donoho, Respondents in the above entitled matter, in the penal sum of Two Hundred Fifty and No/100 — — Dollars ($250.00), to be paid to the said Warren H. Pillsbury, Deputy Commissioner, United States Employees Compensation Commission for the Thirteenth Compensation District, and William Donoho, their successors or assigns, or legal representatives, for which payment well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, firmly by these presents.

The Condition of the Above Obligation Is Such, that Whereas, Contractors, Pacific Naval Air Bases, and Liberty Mutual Insurance Company, a corporation, have appealed or are about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from a judgment dismissing the Complainants' Complaint in said Action, and entered on September 13th, 1944, by the United States [14] District Court of the Northern District of California, Southern Division, in the above entitled action.

Now, Therefore, if the above named Complainants, Contractors, Pacific Naval Air Bases and Liberty Mutual Insurance Company, a corporation, shall prosecute said appeal to effect and answer all costs which may be adjudged against them if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this obligation shall be void; otherwise to remain in full force and effect.

It Is Hereby Agreed by the Surety that in case of default or contumacy on the part of the Princi-

pal or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation, and award execution thereon.

Signed, sealed and dated this 8th day of November, 1944.

(Seal) FIDELITY AND DEPOSIT COMPANY OF MARYLAND

By W. M. WALKER
Attorney in Fact

Attest:

S. M. SMITH
Agent

Examined and recommended for approval as provided in Rule 13.

.....
Attorney

Approved this day of, 1944.

.....

State of California,
County of Los Angeles—ss.

On this 8th day of November, 1944, before me, Theresa Fitzgibbons, a Notary Public, in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared W. M. Walker known to me to be the Attorney-in-Fact, and S. M. Smith known to me to be the Agent of the Fidelity and Deposit Company of Maryland, the Corporation that executed the within instrument, and acknowledged to me that they subscribed the name of the Fidelity

and Deposit Company of Maryland thereto and their own names as Attorney-in-Fact and Agent, respectively.

(Seal) THERESA FITZGIBBONS

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires May 3, 1946.

[Endorsed]: Filed Nov 16 1944. [15]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY ON THEIR APPEAL

I.

That the evidence is insufficient as a matter of law to support the findings of fact made by Respondent, Warren H. Pillsbury, Deputy Commissioner, and in favor of William Donoho.

II.

That that portion of the findings of fact which reads

> "That said inactive tuberculosis was caused to develop and become disabling, either by contraction of original infection from unknown sources, or by reactivation [16] of a previously undiscovered and arrested pulmonary tuberculosis, by conditions of his employment above mentioned, particularly overwork and exposure,"

does not support the award of compensation made in favor of the Respondent, William Donoho, by the Respondent, Warren H. Pillsbury.

III.

The United States District Court erred in granting Respondent's Motion to Dismiss Complainants' and Appellants' Bill of Complaint.

Dated this 25th day of October, 1944.

CLAUDE F. WEINGAND
Attorney for Complainants.

[Endorsed]: Filed Nov 16 1944. [17]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the United States District Court for the Northern District of California, Southern Division:

You will please prepare a transcript of the record in this cause to be used upon appeal in the above entitled cause, embodying the following:

1. Complaint.
2. Motion to Dismiss Bill of Complaint.
3. Transcript of testimony at hearing before United States Employees Compensation Commission, before Warren H. [18] Pillsbury, Deputy Commissioner, Thirteenth Compensation District, held October 6, 1943.

4. Order of Dismissal, dated September 13, 1944.
5. Notice of Appeal.
6. Supersedeas and Cost Bond on Appeal.
7. Designation of Record on Appeal.
8. Statement of Points upon which Appellants Intend to Rely in the appeal in this case.
9. Clerk's Certificate.

Dated this 25th day of October, 1944.

CLAUDE F. WEINGAND
Attorney for Complainants
and Appellants.

[Endorsed]: Filed Nov 16, 1944. [19]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 19 pages, numbered from 1 to 19, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Contractors, Pacific Naval Air Bases, and Liberty Mutual Insurance Company, a corporation, Complainants, vs. Warren H. Pillsbury, Deputy Commissioner, United States Employees' Compensation Commission for the Thirteenth Compensation District, and William

Donoho, Respondents, No. 23225 S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Five Dollars and Seventy-five Cents ($5.75) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 20th day of December, A. D. 1944.

(Seal) C. W. CALBREATH,
Clerk
By M. E. VAN BUREN
Deputy Clerk. [20]

United States Employees' Compensation
Commission
13th Compensation District

In the matter of the claim for compensation under the Act of Congress of August 16, 1941 extending the Longshoremen's and Harbor Workers' Compensation Act to employments on certain military, air and naval bases of the United States.

Case No. DB-P-1-8359

WILLIAM DONOHO,

Claimant.

against

CONTRACTORS, PACIFIC NAVAL AIR BASES,

Employer.

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier.

CERTIFICATION

This is to certify that I am the duly appointed, qualified and acting Deputy Commissioner of the United States Employees' Compensation Commission under the Longshoremen's and Harbor Workers' Compensation and the Defense Bases Compensation Act (Act of Congress of August 16, 1941) for the Thirteenth Compensation District, comprising the State of California and other portions of the United States;

That there has recently been pending before me as said Deputy Commissioner, a claim for compensation transferred to me under said Acts of William Donoho against Contractors, Pacific Naval Bases, employers, and Liberty Mutual Insurance Company, insurance carrier, my File No. DB-P-1-8359.

That the attached are originals or true and correct copies of pleadings, transcript of testimony, and exhibits in said file, as listed below, being a copy of the entire file therein so far as relevant to a review of the above proceedings:

1. U. S. 203, Employee's Claim for Compensation.

2. Transcript of Testimony of October 6, 1943, with attached Exhibit:

Exhibit "A" Letter of William Donoho, dated April 15, 1943.

3. Copy of report of Dr. Frank Porter Miller of April 23, 1943.

4. Copy of Compensation Order of February 24, 1944.

Given under my hand at San Francisco, Calif., this 3d day of April, 1944.

WARREN H. PILLSBURY
Deputy Commissioner
Thirteenth Compensation
District

To be filed in triplicate

Form US-203

United States Employees' Compensation Commission
Office of Deputy Commissioner
Warren H. Pillsbury, 13th District
Case No. DB-P-1-8359

Administering Longshoremen's and Harbor Workers' Compensation Act as Extended by Act of Congress of August 16, 1941—Defense Bases Act.

EMPLOYEE'S CLAIM FOR COMPENSATION

(To be filed with the Deputy Commissioner in accordance with sections 13 and 19 of the law)

INJURED PERSON

1. Name of employee Donoho, William. Employee's check No.....

2. Address: Street and No. Olive View Sanatorium City or town Olive View, Calif.

3. Sex Male. Age 29. Married, single, widowed Married.

4. Do you speak English? Yes. Nationality American.

5. State regular occupation Male nurse, and steward.

6. What were you doing when injured? Engaging in regular employment.

7. (a) Wages or average earnings per day, $10.00 plus full maintenance. (Include overtime,

board, rent, and other allowances.) (b) Per week, $..... (c) Were you employed elsewhere during week in which you were injured? No. (d) If so, state where and when.....

8. Were you paid full wages for day of accident? Yes.

EMPLOYER

9. Employer Pacific Naval Air Bases, Alameda, Calif.

10. Office address: Street and No. PO Drawer F. City or town Alameda.

11. Nature of business Construction.

THE INJURY

12. Place where injury occurred Samoa. (Give place, and name of vessel).....

13. Name of foreman William Miller.

14. Date of accident or first illness, the ? day of ?, 192.., at o'clock M.

15. How did accident happen or how was occupational disease caused? Worked with at least two persons who had active tuberculosis; extremely high temperatures to work under.

NATURE AND EXTENT OF INJURY

16. State fully nature of injury or occupational disease: Tuberculosis resulting from conditions of employment, including infectiousness of fellow workers.

17. On what date did you stop work because of injury? Condition discovered by Army Draft after completing work with above company.

18. Have you returned to work? (Yes or No.) No. If "yes," on what date?....., 192...

19. Does injury keep you from work? (Yes or No.) Yes.

20. Have you done any work in period of disability? No.

21. Have you received any wages since injury? No. If so, from and to what date?.....

22. Has injury resulted in amputation? No. If so, describe same.....

23. Did you request your employer to provide medical attendance? Yes. Has he done so? No.

24. Attending physician: Name..... Address

25. Hospital: Name..... Address.....

NOTICE

26. Have you given your employer notice of injury? (Yes or No.) Yes. When? 4-8-43.

27. If such notice was given, to whom? W. H. Walthall, Pacific Naval Air Bases, PO Drawer F, Alameda, Calif.

28. Was it given orally or in writing? In writing.

I hereby present my claim to the Deputy Commissioner for compensation for disability resulting from an injury arising out of and in the course of my employment and not occasioned solely by intoxication, or by my willful intention, and in support of it I make the foregoing statement of facts.

Signed by WILLIAM DONOHO
Claimant.

Dated September 15, 1943.

Mail address Olive View Sanatorium, Olive View, Calif.

[Stamped]: Received Sept. 7, 1943. District No. 13.

[Stamped]: U. S. Employees Comp. Comm, Pacific District. Received Sep 22 1943.

United States Employees' Compensation Commission
Before Warren H. Pillsbury,
Deputy Commissioner
13th Compensation District
Case No. DB-P-1-8359

WILLIAM DONOHO,

Claimant,

vs.

CONTRACTORS, PACIFIC NAVAL AIR BASES,

Employer.

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier.

TRANSCRIPT OF TESTIMONY AT HEARING

Pursuant to notice, this matter was heard before Warren H. Pillsbury, Deputy Commissioner, United States Employees' Compensation Commission at Olive View Sanitarium, Olive View, Cali-

fornia, on Wednesday, the 6th day of October, 1943, at 11:00 o'clock a.m.

Appearances:

Claimant present in person.

Defendants represented by Claude F. Weingand, Attorney at Law.

Helen Schulke, reporter. [1*]

Mr. Pillsbury: Hearing on claim for compensation, hearing held at Olive View Sanitarium, Olive View, California. Claimant present in person; defendants represented by Mr. Weingand.

This claim arises under the Defense Bases Act, Act of Congress of August 16, 1941, extending the provisions of the federal Longshoremen's and Harbor Workers' Compensation Act to employees on air, military and naval bases of the United States outside the continental United States.

The claim alleges contraction of pulmonary tuberculosis at a defense base of the United States at an island in the Pacific Ocean, named in the claim. The claim is within the primary jurisdiction of the Deputy Commissioner of the Pacific Compensation District, but has been transferred by him to me for hearing and decision, with the approval of the Employees' Compensation Commission.

Mr. Weingand, what is the defendants' position?

Mr. Weingand: That if Mr. Donoho suffers from tuberculosis he did not receive it in the course of his employment for the Contractors PNAB, nor

* Page numbering appearing at foot of page of original Reporter's Transcript.

did his tuberculosis arise out of his employment.

Mr. Pillsbury: The following facts are agreed to by the parties:

1. Claimant, William Donoho was in the employ of defendant, Contractors, Pacific Naval Air Bases, at the [2] island above referred to throughout the period covered by the claim, and that liability of the employer for compensation under the Act was secured by defendant, Liberty Mutual Insurance Company.

2. The claim is within the provisions of said Defense Bases Act and the jurisdiction of the appropriate Deputy Commissioners.

3. No claim is made of intoxication or wilfully self-inflicted injury.

4. Notice or knowledge of claimant's contention within the proper time is admitted.

5. Claimant's average earnings at said time may be taken for the purposes of this proceeding at $85 a week, including maintenance.

6. No compensation has been paid.

7. Claimant has been to no expense for medical treatment. Claimant is now hospitalized at the tubercular hospital of the County of Los Angeles at Olive View.

The only issues are:

1. Whether claimant's tuberculosis is the result in whole or in part of any occupational exposure in the course of his work sufficient to constitute an injury, as said term is defined in said Act.

2. Whether such injury occurred in the course of or arose out of his employment. [3]

3. Extent and duration of disability.

Anything else?

Mr. Weingand: Tentatively until we get some testimony, the statute of limitations. If the testimony develops as I believe it will, then I will withdraw the issue.

Mr. Pillsbury: Will you be sworn?

WILLIAM DONOHO,

claimant, being first duly sworn, testified as follows:

Mr. Pillsbury: Q. Your name is William Donoho? A. Yes.

Q. During what period of time were you employed at this island base?

A. September—I mean February to September.

Q. Of what year? A. Of '42.

Q. 1942? A. Yes.

Q. You arrived there in February, 1942?

A. No, it was March, around the first part of March.

Q. And when did you leave?

A. The States?

Q. No, when did you leave the base?

A. In September, the first part of September.

Q. What kind of work did you do?

A. Well, I signed a contract as a male nurse. When [4] I arrived there was no doctor, and the Navy people took it over, our medical care, and then I went to work driving a truck.

Q. You did not work as a nurse?

A. No, just a little first aid station, and it was—

(Testimony of William Donoho.)

really you could not call it a first aid station, just a first aid container, for cuts and bruises.

Q. Then you drove a truck? A. Yes.

Q. And what was the truck used for?

A. Construction, hauling dirt.

Q. Have you ever had tuberculosis before that you know of?

A. Not to my knowledge.

Q. When did you first commence to feel ill after your arrival there?

A. Oh, I will say two or three months, approximately that time. You know how it is, maybe one day you feel bad, and the next day pretty good.

Q. And what did you first notice?

A. Fatigue, constant fatigue, and although we were working long hours in a tropical climate, hot weather, rainy season, all of us felt that way, so we did not pay much attention to it. I did not pay much attention to it until I came home. [5]

Q. When was the first diagnosis made?

A. When they started to draft me.

Q. When?

A. Some time the first part of the year.

Q. Can you fix the date?

A. No, not exactly.

Mr. Weingand: Can you fix the month, possibly with reference to the holidays?

The Witness: That was what I was thinking of. I think it was in February, if I am not mistaken.

Mr. Pillsbury: Q. 1943?

(Testimony of William Donoho.)

A. '3, yes. I could not be sure because I was in such confusion after I found out.

Q. Why did you leave the work?

A. Completion of the work.

Q. Did you work after you returned?

A. No, I spent my tme building myself up.

Q. When did you arrive on the mainland on your return? A. In September.

Q. Did you do any work in Honolulu on the way back?

A. No, we came directly from the island.

Q. Where did you come to on the mainland?

A. San Diego.

Q. Is your home there?

A. No, it is in Los Angeles. [6]

Q. What did you do in San Diego?

A. San Diego? We went through the customs office and boarded a train for San Francisco.

Q. Were you in San Francisco?

A. No, I got off in Los Angeles.

Q. And then where did you live until September? A. 1512 West 27th.

Q. Is that your home?

A. No, I have no home—an apartment.

Q. Did you do any work during that time?

A. No.

Q. How did you feel during that period?

A. Well, you know, outside of fatigue I felt fairly good, and I gained in weight.

Q. Were you able to work during that time?

(Testimony of William Donoho.)

A. No, I don't think I would have been, I don't think I could have given a man a full day's work.

Q. Tell me more about your first discovery of your condition, when you first got a diagnosis.

A. When I first got a diagnosis was through the Army, and they referred me to the City Health branch, and the next day I went up and they examined me and stated the same tuberculosis as the Army, and I was fluoroscoped and sent to the General Hospital for x-rays, and they run sputum tests and found it positive. [7]

Mr. Weingand: Q. Is that the first time you knew you had tuberculosis? A. Yes.

Mr. Weingand: I will withdraw the statute.

Mr. Pillsbury: Q. Going back to your work on the island, do you attribute your development of tuberculosis to anything connected with your work there?

A. Yes, I do, because I was examined by the Navy in Long Beach before I left, and they found me free of tuberculosis; and when I went over there——

Q. How do you know?

A. I have their medical.

Q. Have you it here? A. Yes.

Q. May I see it, please? Did they make any sputum test for tuberculosis, or was it a routine physical examination?

A. No, when I had my blood test they flouroscoped me. These are the instructions for the No. 8 examination.

(Testimony of William Donoho.)

Q. Produces document, certificate of medical examination, dated February 22, 1942, signed by B. C. Shackford, Lt. Commander, M.C., U.S.N.R. Line 8 relating to lungs reads: "Lungs: Right, normal; left, normal. History of tuberculosis, denied."

A. Instruction for examination is on the back in paragraph 8. [8]

Mr. Pillsbury: The clause reads: "8. Lungs: It is necessary that the ausculatory cough be used. If tuberculosis is present state whether active, or arrested; if arrested state your opinion as to how long it has been quiescent. Sputum to be examined for tubercle bacilli on suspected cases."

Document returned to claimant.

Q. You say the fluoroscope test was used?

A. Yes, they examined me on one floor, and sent me to another floor to have my blood tested.

Q. Is that a routine test, or especially for your benefit? A. I could not say.

Q. Was any sputum test made? A. No.

Q. What in the nature of your work on the Island do you connect with your condition?

A. Well, Mr. Pillsbury, the first thing is climatic, conditions there were very bad in the rainy season, it rains approximately 190 inches a year in the rainy season.

Mr. Weingand: How much?

A. Around 190 inches, which makes working conditions on the outside disagreeable, no matter how much protection is worn against it. Then when I was driving a truck the equipment was so

(Testimony of William Donoho.)

that we got soaked every time it rained, four or five times a day. And then after I drove a truck for a time, [9] one of the stewards left and I took his place because I had a little information on food, and from then on, why, I worked a considerable number of hours a day.

Mr. Pillsbury: Q. How long?

A. Well, some months I was paid for 12 hours a day.

Q. Did you work 12 hours a day?

A. Sometimes I worked longer than that, other days I could swear 16 to 18 hours a day.

Q. What kind of work? A. Steward.

Q. What did you do?

A. Running the mess hall.

Q. You did not do any hospital work while there?

A. No. There was one patient that had the measles and they had him isolated and I would go over once a day and check with him to see if he wanted anything.

Q. That was measles.

A. That was all—nothing to that.

Q. How long would you say you worked over 12 hours a day?

A. Oh, I will say four months.

Q. And that was towards the beginning or end?

A. Toward the end.

Q. Was it during that time that you became more fatigued? [10] A. Yes.

Q. What was the temperature there?

(Testimony of William Donoho.)

A. Well, the temperature, I would say, which we never did check very often, I would say was around 90 and 100, with humidity very high. That is my feeling or belief. I could not say if it is correct or not.

But there is another fact I would like to bring out, is that we were employing natives there. They were working in the mess hall, and these native food handlers, we never could get them to give the natives a physical examination, and I think tuberculosis among the natives in the island might be common.

Q. Do you know if any of the natives who worked there had tuberculosis?

A. No, because we never could get physical examinations.

Q. Did any of them cough? A. No.

Q. Were any taken ill, that you know of?

A. Yes, but I could not say with tuberculosis, because they would say "We are going to quit," and you find they were sick, or just tired of working.

Q. You have no definite information then or observation that any of the natives who worked with you either had tuberculosis, or were sick with a condition resembling tuberculosis? [11]

A. No, but I have heard some of the other employees—there is another man by the name of Bob Breman, and he is a patient at Acton, now——

Q. Where is that?

A. It is up toward——

(Testimony of William Donoho.)

Mr. Weingand: Toward Mojave, is it?

A. Yes, near Lancaster.

Mr. Pillsbury: Is that a tuberculosis hospital?

Dr. Ford: It is associated with Olive View, I believe.

Mr. Pillsbury: Q. Do you know whether he has been diagnosed as having tuberculosis?

A. Yes.

Q. What was your contact with him on the job?

A. Well, going over on the boat. While in—he drove a truck the same as I did, and while working in the mess hall, and he is a friend of mine, and casual visits.

Q. Was he known to be ill before you left?

A. I could not say. I do not think so because he went through the Navy examination like I did.

Q. I mean before you returned.

A. No, the only thing, he showed fatigue constantly and loss of weight, as I did, and as I say all of us did that. I have heard since I have been here, a man by the name of Forbes——

Q. Mr. Breman, was he coughing on the job?

[12]

A. I could not state. I did not hear him.

Q. Were you unusually close to him?

A. Well, just like under any working conditions. Sometimes yes and sometimes no.

Q. He did not cough in your face?

A. That is more or less something that happened a year ago. It is hard to say yes or no.

(Testimony of William Donoho.)

Q. You mentioned another man.

A. Forbes.

Q. Forbes. What about him?

A. His address is PNAB, but he came back on an earlier boat; and I understand the Navy authorities diagnosed his condition as tuberculosis, but did not confine him.

Q. Do you know where he is now?

A. No. PNAB would have his address.

Q. Do you know definitely whether he has tuberculosis or not?

A. No, I can't say. It is only from what I have heard, and that was talked about while we were on the island.

Q. Did you have any close contact with him?

A. The only contact, I was over his cabin. He was in there when I would check up, and I saw him in the mess hall.

Q. Was he coughing?

A. Not to my knowledge.

Q. You do not recall any time he coughed or hemorrhaged [13] when you were close?

A. No.

Q. Do you know of any other possible exposure?

A. No, although I have heard several of the boys state that several of them has broke down. I do not know whether it is tuberculosis or something else.

Mr. Pillsbury: Any questions, Mr. Weingand?

Mr. Weingand: Q. Mr. Donoho, approxi-

(Testimony of William Donoho.)

mately how many persons were on the island while you were there?

A. You mean the natives?

Q. The contractors?

A. Well, say half of them, or about 100, came home before I did. There was maybe approximately 300. This is approximately, because I could not say.

Q. When you said you served 250 meals a day, you mean that is per meal?

A. No, it is per day.

Q. When does the rainy season begin on the island?

A. If I remember right—I could not say, it is like our winter months, and it comes off—let me get this right. I will have to tell you how it happened. I arrived the first part of March, and the winter months was coming on, so it would be the opposite of here because it is below the equator.

Q. Was it the rainy season when you arrived?

A. No, it was about a month before the rainy season [14] started, approximately that, and it lasted up until approximately a month before we came home.

Q. That would be April to August?

A. Approximately.

Q. Living accommodations, Mr. Donoho, had they been prepared for you when you arrived?

A. Yes.

Q. Will you describe the type of accommodations?

A. Well, the type of accommodations varied.

(Testimony of William Donoho.)

Q. What did you have?

A. Well, first, I had a room with another man, a carpenter foreman. It was a small room, about half the size of this, with a little wash basin. Before we left to come home, when the Seabees took over, we went back to——, about two weeks before we come home, and in those two weeks we slept four to the room, in double deck beds.

Q. With the exception of that last two weeks, you shared a room with another employee?

A. That is right.

Q. Did that employee to your knowledge have tuberculosis?

A. No, not to my knowledge. At first I lived with—his name was—he is a carpenter foreman, and his name is Strub—no, Shuberg, and he did run down like the rest of us, and he went to see the Navy doctor and they sent him to [15] ——to have his teeth extracted, and when he came back he was feeling better, and from then on he kept at his work.

Q. As far as you know he did not have tuberculosis?

A. No, that is the only sickness I know Shuberg —I can't remember his name.

Q. Was the construction of the living accommodations, was it of new construction? A. Yes.

Q. It was not a native——

A. It was not a native dwelling.

Q. And how high off the ground was its floor?

A. Three or four feet.

(Testimony of William Donoho.)

Q. How long were you driving a truck?

A. Let's see. Oh, I will say two to three months. I never did keep much track of time down there, and we worked seven days a week, and one month came and went.

Q. Did the truck have a cab?

A. Yes, but no doors.

Q. Did you have a raincoat? A. Yes.

Q. Mr. Donoho, when you went to work as a steward, I take it you had charge of procuring necessary supplies?

A. Under a man named Miller, chief steward.

Q. Did you make out menus? A. Yes. [16]

Q. Did you do any actual cooking? A. No.

Q. Did you do any of the manual work of preparing the food?

A. No, I never touched the food at all.

Q. I take it then that your work was in a supervisory capacity? A. Yes.

Q. Did your work keep you inside or outside most of the time?

A. About half and half.

Q. What type of stewarding would require you to be outside at least six hours or seven hours a day?

A. Carrying food supplies and overseeing the upkeep of the outside living quarters.

Q. Do you remember, Mr. Donoho, in the month of April of this year when your statement of this experience was taken by a representative of the insurance company?

A. Yes, some young lady took it.

(Testimony of William Donoho.)

Q. That was taken in the office of the insurance company in Los Angeles? A. Yes.

Q. Did you tell the girl that you had been exposed to possible tuberculosis infection from these two fellow employees whose names you have given us? [17] A. Yes.

Q. And was that put in the statement?

A. I do not know if she put it in or not. It was a four or five page statement, and I had to mark initials on any mistakes in her statement, and signed it also, and I never read it over completely from top to bottom or start to finish, and I could not say if she put it in the statement or not.

Q. At that time was it your belief that your condition was probably due to contact or an infection from these other fellow employees?

A. From exposure of work and living conditions.

Q. Mr. Donoho, is that your signature at the bottom of page 1? A. Yes.

Q. Will you look at the last page? Will you please say if that is your signature?

A. Yes.

Q. Read the sentence which immediately precedes your signature.

A. You mean I have read the four pages and it is true? Yes.

Q. You did read it? A. Glancingly.

Q. I asked you whether you read it?

A. Glancingly I did. [18]

(Testimony of William Donoho.)

Q. Did you tell her at that time that you had this possible infection?

A. Well, we talked about it.

Q. Will you read the statement and see if there is any mention made of that phase of your claim?

A. From top to bottom of the letter?

Mr. Pillsbury: The letter will speak for itself.

The Witness (After reading): No, it is not in there.

Mr. Weingand: I offer it in evidence.

Mr. Pillsbury: Received as Exhibit 1.

Otherwise does this statement seem to be a fair report of what you told the lady?

A. As well as I can remember.

Q. Did you discover anything that seems specifically incorrect or that you did not say or that is not true? A. No.

Mr. Pillsbury: Any other questions?

Mr. Weingand: Q. Are you a registered nurse?

A. No.

Q. Practical nurse?

A. That is right: I received my training in the Army.

Q. Had you handled or taken care of any tuberculosis patients prior to your employment on the island?

A. No, I never have to my information, or to any doctor's information, because we were told that if a doctor can make a [19] diagnosis while on the case it is wise to ask, and he generally lets you know

(Testimony of William Donoho.)

before you go on a case so you can use all precautions.

Q. You never lived with this employee Bob Breman, did you? A. No.

Q. Did you live with Forbes? A. No.

Q. So that your only contact with these two individuals was the same kind of contact that you had with the remainder of the 300 men, you would see them at work, at the mess hall, and at other places?

A. That is right, in our daily contact at work.

Q. While you were on the island did you have night sweats? A. No.

Q. Did you ever have any P.M. or afternoon temperature? A. Not that I know of.

Q. Your only complaint was fatigue?

A. After I was on the job, yes.

Q. When you returned to Los Angeles, I take it you lived here in Los Angeles from September of 1942 until you came to Olive View?

A. That is right.

Q. When did you enter this institution?

Dr. Ford: April 21st. [20]

Mr. Weingand: What did you do from September of 1942 until April 21st?

A. Well, I came back like I said, and I rested as much as I could, and I took a trip back east.

Q. Where?

A. Leavenworth, Kansas, and Columbia, Tennessee.

Q. How did you go? A. By train.

(Testimony of William Donoho.)

Q. Return by the same method?

A. Yes, partly.

Q. How did you come back?

A. I rode with a friend from Columbia, Tennessee, to Oklahoma, an Army officer at Fort Sill.

Q. During the period of time you lived in Los Angeles after your return from the island, did you engage in any form of recreation?

A. No—well, like say a walk.

Q. Picture shows?

A. No, because I didn't—I just didn't feel like—you know, you don't feel like it.

Q. Did you go to church? A. No.

Q. Just stayed around the house?

A. And rested, and then after I found out I had tuberculosis, after the Army turned me down, I went to the [21] clinics.

Q. Are you married? A. Yes.

Q. Any children? A. No, sir.

Q. Are your mother and father living?

A. Yes.

Q. Any brothers or sisters? A. Yes.

Q. How many?

A. One brother and two sisters.

Q. Any sisters dead? A. No.

Q. Any brothers dead? A. Yes, one.

Q. Older or younger? A. Older.

Q. What was the cause of his death?

A. Cancer of the throat.

Q. Your father and mother are still living?

A. Yes.

(Testimony of William Donoho.)

Q. Do you know of any members of your family other than those I have just mentioned who have had tuberculosis? A. No.

Q. Did you understand my question? [22]

Mr. Pillsbury: Have any members of the family had tuberculosis?

A. No, not that I know of.

Mr. Weingand: Q. Now going back to this preemployment physical examination, it was made at Long Beach? A. Yes, at the Navy there.

Q. You know what a fluoroscope is?

A. Yes.

Q. And will you state if the doctor in attendance fluoroscoped you?

A. Not the doctor named in this report, but another man upstairs.

Q. You have seen a fluoroscope?

A. Yes, I have been examined by one every week.

Q. And the fluoroscope was similar to the kind Dr. Ford uses? A. Yes.

Q. And I believe you said you had a blood test?

A. Yes.

Q. That was a Wasserman for syphilis?

A. I don't know whether Wasserman or Kahn.

Q. You didn't have a skin patch test, did you?

A. No.

Q. I believe that you didn't have an examination made of your sputum? [23]

A. No, that is stated on the back of the medical.

Q. Have you ever had any respiratory trouble?

A. No. I have had my nose broken.

(Testimony of William Donoho.)

Q. Pneumonia? A. No.

Q. Influenza? A. Not to my knowledge.

Q. Any trouble with your lungs before?

A. The only thing I ever had is childhood diseases and I don't remember which ones I had.

Q. You don't know of any particular reason why your chest should be fluoroscoped?

A. No, not unless it was a routine check.

Mr. Pillsbury: Doctor, may we take your testimony?

DR. JAMES B. FORD, JR.,

having been first duly sworn, testified as follows:

Mr. Pillsbury: Q. Your full name, please?

A. James B. Ford, Jr.

Q. And you are a physician and surgeon?

A. Physician and surgeon licensed in California.

Q. Of what school, Doctor?

A. Duke University.

Q. And you are an intern?

A. Resident physician.

Q. What is the diagnosis for Mr. Donoho? [24]

A. Far advanced pulmonary tuberculosis.

Q. And can you state, Doctor, an estimate from your X-rays and examination as to its possible duration?

A. You can't. There is no film to compare previous to infection. You can't state from our present X-rays.

(Testimony of Dr. James B. Ford, Jr.)

Q. Can you state whether the condition as you find it could reasonably have developed since March, 1942, or whether it is necessarily older?

A. I could definitely state that it could have developed since March 1942.

Q. And is it consistent with his fatigue beginning at that time that he has testified to in the summer of 1942?

A. That is a very common symptom of early tuberculosis.

Q. And is it consistent with the medical information you have that it could have started then?

A. Yes.

Q. Is there any indication in the X-rays or evidence you have that there may have been an earlier or arrested or inactive condition?

A. It is not possible to state that. The X-ray showed that he had a mixed type, which we speak of, as showing some active and some healed tuberculosis together, but we cannot state that that healed lesion has been there for a long time. The process of tuberculosis is progressive and healing, and all steps can occur at the same time, and having had a certain [25] amount of rest he could have healed some.

Q. Can you express an opinion as to whether his case is one of primary tuberculosis starting about the summer of 1942, or whether it might be a reactivation or acceleration of an earlier condition?

A. I could not state now.

(Testimony of Dr. James B. Ford, Jr.)

Q. With reference to the conditions that he has discussed of his employment, the nature of his work during the rainy season, working 12 to 18 hours a day during the time the fatigue started, exposure to rains, temperature between 90 to 100, working in the tropics, whether any of those conditions would have any substantial influence in his developing tuberculosis at the time we assume he did? That is, was there any specific or greater exposure by reason of those conditions than ordinary?

A. Of course, it is not possible to develop tuberculosis without exposure to the tubercle bacillus. However, with exposure to the disease, I think that working long hours and in bad weather, it would tend to lower the general physical condition of the patient and would have influence on that.

Q. How about frequent exposure to rains and getting wet?

A. I think that would tend to lower his general physical condition.

Q. You have heard his testimony about two or more men on the job coming back here with tuberculosis. Would his [26] contact with them as he described it be a possible cause of his getting the disease?

A. His contact with these two individuals was not very close as he described it. However, it is possible to contract tuberculosis through casual contact with individuals. However, I could not say that this was his exposure. It could have been elsewhere.

(Testimony of Dr. James B. Ford, Jr.)

Q. How accurate do you think a fluoroscope examination at the time he entered the employment would be in determining whether he had tuberculosis?

A. It is not as accurate as an X-ray. You can pick it up by a fluoroscope examination, but you can't definitely rule it out.

Mr. Weingand: Q. Doctor, as I understand your testimony you stated that Mr. Donoho might have contracted this disease since the summer of 1942. Isn't it equally possible that he might have contracted the disease prior to the summer of 1942?

A. Yes.

Q. In other words, it seems a matter of guess work to try to determine the date of onset of this condition?

A. The date of onset cannot be determined.

Q. Is it a respecter of a particular race or class of individuals?

A. Tuberculosis is no respecter of races. Some races seem to be more susceptible. [27]

Q. Is it a respecter of sex? A. No.

Q. Or of age? A. No.

Q. And in your experience, Doctor, you have seen hundreds of patients who have tuberculosis?

A. Yes.

Q. And many of them who have had no exposure to the tropics? A. Oh, yes.

Q. And who have not been subjected to a wetting in tropical rains? A. Yes.

(Testimony of Dr. James B. Ford, Jr.)

Q. And who have led sedentary lives?

A. Yes.

Q. And persons who have not overworked?

A. Yes.

Mr. Pillsbury: Q. Doctor, I think you stated that it was equally possible that he had had the tuberculosis before. Is there any preponderance of probability one way or the other, considering the history given? In other words, might not his testimony that he felt his first acute fatigue during the period of this long work and of exposure, and the absence of any finding of tuberculosis at an earlier date, make it more possible that he contracted it in the fall or summer of [28] 1942 than at any other time?

A. Well, that is the first subjective symptom. That is the first thing he noticed, his fatigue, and that is a common symptom of active tuberculosis. I cannot say that the disease started at this time, although it is quite possible that it did.

Q. In view of the whole history it is not a little more likely that it started at the time this fatigue started? A. I would think so.

Mr. Weingand: Q. You cannot make that statement with any assurance of certainty?

A. No, I can't make it a definite statement.

Q. Doctor, this tuberculosis is a slow process in its development, isn't it?

A. That depends on the individual case.

Q. And I believe you said that Mr. Donoho's condition is——

(Testimony of Dr. James B. Ford, Jr.)

A. Far advanced. That was the diagnosis on admission.

Mr. Pillsbury: Q. Bilateral?

A. Yes.

Mr. Weingand: Q. That would normally indicate that it had been there for a considerable period of time?

A. I don't know what you mean by a long time.

Q. Longer than a month. Can we have this condition within a month of a primary infection?

A. I would not say as a rule. [29]

Mr. Pillsbury: A month is a short time.

Mr. Weingand: I was going to say next six months or a year.

Q. In other words, Doctor, isn't it a fact that the farther advanced the particular case may be, generally the longer it has been in existence?

A. Well, I want to make a statement here that is fair. You know the development of tuberculosis depends on a number of different factors, and I would say that with far advanced tuberculosis you would expect that it had not developed in a period of a month, but it is quite possible for that much to develop in a period of six months.

Q. That is the same quantity of disease which Mr. Donoho has? A. Yes.

Q. How long have you specialized in diseases of the chest? A. Almost three years.

Q. And prior to that time what?

A. I graduated from medical school in December, 1939.

Q. Interned?

(Testimony of Dr. James B. Ford, Jr.)

A. My general internship was taken at Grady Hospital from July 1, 1942 to July 1, 1943. I began my tuberculosis work in January 1940, and continued for a period of two and one-half years up to July 1, 1942, and I have been employed [30] at Olive View since July, 1943.

Q. Doctor, during that period of time have you taken care of or observed or examined patients from the tropics other than Mr. Donoho?

A. No.

Q. Do you have any literature, Doctor, to support your statement that in your opinion exposure to tropical rain, such as described——

Mr. Pillsbury: Repeated exposure.

Mr. Weingand: Q. ——could aggravate or accelerate the growth of the disease?

A. Yes. However, I think that if he is exposed to bad weather the effect would be the same here as in the tropics.

Q. Do you have any literature to support you in this statement? A. Not that I can recall.

Q. Of course, when a patient has tuberculosis any type of endeavor is contraindicated, is that true? A. Yes.

Q. That is why we have the sanitarium and we put Mr. Donoho to bed.

Mr. Pillsbury: Q. Doctor, may tuberculosis move more rapidly in tropical climates than in temperate climates?

Mr. Weingand: If you know.

(Testimony of Dr. James B. Ford, Jr.)

A. I don't know according to the white race. I know [31] there are natives of tropical climates that seem to develop rapidly.

Q. Does the progress move faster?

A. It seems to be a more virulent type of tuberculosis.

Mr. Pillsbury: That is among the natives.

Mr. Weingand: Q. You are talking——

A. I could not state as to the white race in a tropical climate.

Q. Doctor, I take it the prognosis is guarded?

A. It is.

Mr. Pillsbury: Mr. Donoho, do you want to ask the doctor any questions?

Mr. Donoho: Q. In the setup of sterilization of the dishes and stuff in this mess hall, and different equipment used to eat out of, could tuberculosis bacillus be transferred say from person to plate and from plate to another person?

A. Oh, yes, it could. You mean after it has been sterilized?

Q. No, just plain washing without sterilization.

A. It is possible that it could be carried from one person to another.

Q. The facilities for washing the utensils and dishes, there was no sterilization and no disinfectant except the soap used in the water.

Mr. Pillsbury: The work was done by natives? [32]

Mr. Donoho: Q. And if there was an infection

(Testimony of Dr. James B. Ford, Jr.)

among the natives it would be very possible that it could be transferred from a diseased person to a well person?

A. It can be transferred to a well person without there being actual contact between the two.

Q. You said there is a slow and a rapid case of tuberculosis? A. That is true.

Q. And then in the rapid case of tuberculosis you said inside of six months it could advance to my state? A. Yes.

Q. That I am advanced to now? A. Yes.

Q. And if it advanced to tuberculosis, I mean to the place where they could tell if I had tuberculosis or not, even the first steps, it is possible that I could show fatigue then just as well as after I was far advanced? A. Yes.

Q. In other words, when I first started showing fatigue I could have had tuberculosis in the first steps? A. Yes.

Q. And later on after I came back and worked harder it could have gotten to where it was more rapidly advancing on me? A. Yes. [33]

Q. In other words then, I could have had tuberculosis in a far advanced stage and still gained and picked up weight to the place I am now although I have taken rest? After I got back from down there I could have showed improvement and still had it in far advanced stages? A. Yes.

Mr. Weingand: Q. Doctor, could Mr. Donoho have contracted this after his return in September of 1942? A. Yes, he could have.

(Testimony of Dr. James B. Ford, Jr.)

Q. You have heard his testimony that he was in Los Angeles from September until the following April? A. Yes.

Q. You do not know of course the source of the infection? A. No.

Q. Nor can you determine that with any certainty? A. That is correct.

Mr. Donoho: That is what I was trying to say, is that my stage could have been far advanced when I got back just as well as now even though I have taken rest.

Mr. Pillsbury: Does either side have anything more to offer or suggest?

Mr. Weingand: Mr. Pillsbury, I ask for a reasonable length of time within which to contact this Breman at Acton, and I think Dr. Frank Porter Miller examined you, didn't he? [34]

Mr. Donoho: I couldn't state his name. He examined and at that time he stated, with just a stethoscope examination, at the time he said that it was a childhood type of tuberculosis. I don't think that could be diagnosed with just a stethoscope examination.

Mr. Pillsbury: Did he have any X-rays taken?

Mr. Donoho: Later, after he told me that, he had an X-ray made, and then my wife called the insurance company and they said, why, I was developing sugar diabetes. Dr. Hoken run a test on me.

Mr. Weingand: Has Mr. Donoho shown any evidence of diabetes since being here?

(Testimony of Dr. James B. Ford, Jr.)

Dr. Ford: No.

Mr. Weingand: I have never seen the report of Dr. Miller.

Mr. Pillsbury: Do you desire to file the report now?

Mr. Weingand: I do.

Mr. Pillsbury: Granted.

Was any sugar test taken?

Dr. Ford: 90.3.

Mr. Pillsbury: Small.

Dr. Ford: Within normal.

Mr. Weingand: Thank you, Doctor.

Mr. Pillsbury: Either side is given 30 days in which to request further proceedings if further evidence should come to light. [35]

Mr. Weingand: Do you have any sickness insurance?

Mr. Donoho: Yes—no; no, I have a life insurance policy.

Mr. Weingand: Does it pay any health benefits?

Mr. Donoho: No, not that I know of.

Mr. Weingand: Are you receiving any money from any insurance company by reason of your condition?

Mr. Donoho: None whatsoever.

* * * * * * * *

I hereby certify that the foregoing is a correct transcript of the testimony and proceedings taken

in the above matter at the hearing held on October 6, 1943.

HELEN SCHULKE
Reporter. [36]

EXHIBIT A

Los Angeles, Calif.
April 15, 1943

This is the report of William Donoho, age 28, born July 24, 1914, at Leavenworth, Kansas. I am married, and living with my wife, Rachel, at 1512 W. 27th St., Los Angeles, California. I have no children. This above address has been my home address since approximately Sept. 1, 1942. I was hired by Mr. Jamison of Contractors, Pacific Naval Air Bases, on February 27th, 1942, in Los Angeles, California. Prior to accepting this position I was engaged in nursing private cases for about four years. I am not a registered nurse. I worked steadily during that time, and went from one case to another. In that four year period I was not unemployed more than two weeks at any one time. I specialized in mental and alcoholic cases exclusively. When I was on a case, I worked 8 hours at a time. The shifts I worked varied with the cases. Sometimes day, sometimes night work. Before nursing private cases I was in the U. S. Army Medical Corps, a private. I was in the Service three years. I was stationed at Fort Leavenworth, Kansas and Barksdale Field, La. After signing the contract of hire on February 27th, 1942,

I stayed in San Francisco a week. I left the United States on March 4th, 1942, destination Samoa. I signed the contract of hire with the knowledge that I was to work in Samoa, T. H. I was hired as a male nurse. It was my understanding that a doctor W.D. was to go to Samoa ~~with me~~ right after I did, but he never came, so the Navy took over the cases requiring medical treatment there, and I became a steward in the Mess Hall for P.N.A.B. I arrived in Samoa about March 15. There were quarters ready for us when we arrived, two men to a room. The barracks were newly built, about two feet from the ground. The climate in Samoa is sultry. It has intermittent cloudbursts, every half hour or so during the rainy season. Between showers the sun shines and you can see the steam come from the ground. When it doesn't rain, it is sultry and hot. It is very humid atmosphere. I worked in the Mess Hall every day I was in Samoa—i.e. 7 days per week. I worked from 10 to 12 hrs. per day, and on some days 16 hours. My contract called for a flat salary of $150.00 per month. When I became a steward my pay rate was changed to $1.25 per hour, with time and a half for any time worked in excess of 8 hours per day. My average monthly earnings varied from $325.00 to $375.00 per month. My duties consisted of managing the Mess Hall at Taufer, a small village. I was overseer of barracks and small cottages occupied by employees of P.N.A.B. At the Mess Hall, we served about 250

meals per day. We had cooks from the States, but natives did all the service, & cleaning up, etc. I did not come in contact with the food at all. I did all the procurement work for food & barracks supplies. I got up at 4:00 A.M. every day, and didn't get to bed until 9:00 or 10:00 P.M. Due to the heat and humidity, I found sleep not very restful, and too, I was often awakened by members of the night shift with problems they wished to discuss. I noticed, of course, a certain amount of fatigue, but considered this to be a normal result of the climate and hard work. Everyone else felt the same way. I was so busy every day all day that I had no time to analyze my feelings one way or the other. I never did reach a point of exhaustion, or what I would term abnormally tired. I suffered no fainting spells, dizziness, nausea, nor illness of any kind while I was in Samoa. I stayed in Samoa until about the middle of September. About four weeks before we sailed, the Naval Construction Battalion personnel moved in and took over our barracks, so for the last month, we had to double up and sleep four in a room. The C-Bees took over our work there, and we were relieved. On around Sept. 15, 1942, I sailed for the States. We arrived home & were paid off around the 25th of Sept. 1942. We disembarked in San Diego & came to Los Angeles by train. I went directly to my home. After I got home I suffered constantly from a general fatigue. I just never did have the energy to line up any work for myself. I never had any physical discomfort

other than fatigue. I had no symptoms of any kind. I decided this tired feeling was a result of overwork in Samoa. I ate the best food I could get, and rested all the time, and I gained 27 lbs. since I returned from Samoa, but I can't get rid of this

W.D.

constant fatigue. I didn't work at all, and ~~on~~ the last part of February I received my notice to appear for Physical Examination from the draft board. When I was examined by the Army doctor, I was informed that I was suffering from pulmonary tuberculosis in the active stage. On this basis I was placed in 4-F classification & deferred. I then went to the City Health Dept. & was examined and X-rayed. They told me the same thing, and recommended that I apply for admission to a sanitorium. The City doctor who examined me, Dr. Vera Waegel, M.D., stated that there is a possibility that this condition may arise from my employment in Samoa, and the representative of Olive View Sanitorium where I have applied for admission, said I couldn't be admitted there until I had made claim & settled the matter one way or the other, because once treatment is commenced in their institution, they do not want me disturbed by outside influences or business cares. I was told I could make claim under Compensation by Mrs. Edith H. League, a social worker, who visited me at my home. I have today made claim, and will await its disposition before taking any further steps. I still feel fine, & I have only the one symptom of constant fatigue. I have no cough, & have never spit blood.

I am ready for sanitarium placement now, and will be admitted as soon as disposition is made. I have never had any sickness other than common childhood diseases & have never been under the care of a physician in my life until now.

I have read this report on four pages and it is true.

WILLIAM DONOHO

(Copy)

Frank Porter Miller, M. D.
939 Pacific Mutual Building
Los Angeles, California
April 23, 1943

Liberty Mutual Ins. Co.,
714 S. Hill St.
Los Angeles, Calif.
Re: W. Donoho

Emp: Pacific Naval Air Base
Date of Inj. Feb. 1943

Gentlemen:

As per your request, the above named applicant appeared at our office for an examination 4-19-43. He gives his home address as 1512 W. 27th St., Los Angeles. He is 28 years of age, born in Kansas in 1914. His normal weight is 155 pounds. Present and greatest weight 172. He gives his occupation as that of a male nurse and steward.

Family History: His father, W. J. Donoho, was born in Kansas, is 54 years of age and well. His mother, N. Bishop, was born in Kansas, is 53 years of age and well. No brothers living. One brother dead from cancer of the throat. Two sisters living and well, none dead.

Previous Diseases: Usual diseases of childhood, but cannot recollect the exact ones, but he is certain that the convalescence was uneventful. No pneumonia, influenza, pleurisy or blood spitting. No operative work of any character. Had his right arm broken as a youngster. No other accidents.

Occupational History: Graduated from high school in 1934. He then went into the Army Medical Corps in 1935 at Fort Leavenworth, Kansas, as a clerk in the out-patient department. Remained in the Army for 3 years. Discharged as physically fit in 1938. Came to Los Angeles in 1938 and began male nursing on alcoholics and mental cases. Nursed until he went to Samoa in February, 1942. He was hired as a nurse by Pacific Naval Air Base, but due to the fact that the Navy took over the medical end, he was transferred as a steward in the mess hall. Was in their employ from February to September, 1942. Returned to the Mainland in September 1942. Has done no work since this time.

Present History: In February 1943 he was examined by the Navy at Long Beach and pronounced fit for foreign service. No x-ray was taken at this time. In February 1943 was examined by the Army for induction purposes and rejected, because

of tuberculosis. He reported to the City Health Clinic and they confirmed the diagnosis. Was sent to Los Angeles County General Hospital for an x-ray. For the past six months he has not attempted to work. Has not felt badly except a bit "run down". Does not cough or expectorate any sputum. Sputum was positive at the City Health Clinic.

Physical Examination: Scalp negative. Eyes react normally both to light and accommodation. There is a slight nasal obstruction with a deviation of the septum to the left. Complete absence of any cervical glands. Thyroid is normal as regards size, shape and consistency. Teeth are in fair dental repair. There is an absentee bicuspid and first molar on the right below. Pharynx is markedly injected. Tonsils are only slightly visible.

Chest: There is some tension in the shoulder girdle group of muscles on the left side. The mobility at all four poles is more or less equal. The degeneration of the skin and subcutaneous tissue is only noticeable above the spine of the scapula posteriorly and a marked degeneration through the interhiler area upon either side. The breath sounds upon the right are characterized by harshness and a slight amount of roughness, both anteriorly and posteriorly. Upon the left side roughness is the predominant note and posteriorly we find a few rales at the apex following an expiratory cough. The infiltration is largely above the second rib anteriorly and the midscapular area posteriorly upon either side. Heart sounds are rather rapid but free from any evidence of adventitious murmurs.

Blood pressure 146-86. Pulse rate 90. The patient is very apprehensive and the abdomen is very taut. Liver, kidneys and spleen are not palpable. There were no areas or masses discernable in the abdomen. Genito-urinary negative. Reflexes physiologic. An inventory of the remaining systems failed to reveal any additional pathology.

Laboratory Findings:

Blood Count:

Hemoglobin: 104%	Poly: 68%	Base: 1%
Erythrocytes: 4,850,000	Lymph: 27%	
Color Index: 1.0	Mono: 3%	
Leukocytes: 7,350		

Urinalysis:

Color: straw	Albumen: negative
Reac.: pH 5.0	Sugar: + + + + (2%)
Sp. Grav.: 1.029	Micro: occasional pus cell

X-Ray Findings: An x-ray picture taken 4-19-43 shows the cardiac shadows more or less perpendicular. The contous of the diaphragm appears to be normal and the angles are unobliterated. There is a marked sized hilus infiltration with some calcified plaques within its confines. Above the third rib anteriorly on the left we find a scattered infection with very little breaking down of the tissues, although there is some suggestion of excavation above the left clavicle. Above the second rib on the right we also have this scattered infection which is characterized by infiltration plus a certain amount of fibrosis. From an x-ray viewpoint, this man is definitely suffering from an active type of tuberculosis

at this time, although it has the ear marks of some chronicity.

Conclusions: Here is an individual who was sent to Samoa as a male nurse but due to the fact that doctors were very scarce, it became necessary that the Navy take over the medical supervision. Due to this fact, he was transferred as a steward in the mess hall and that was his employment while with the Pacific Naval Air Base. It seems superflous to discuss at length the mere fact that a man develops tuberculosis because he becomes a resident in the tropics and I doubt whether that has any bearing upon the case. This case has been held in abeyance due to the fact that we wished to study the transcript. By the admission of the applicant, he states that he began feeling badly two or three months after arrival upon the islands. This in itself indicates the presence of the disease prior to his work at this defense base. A chronic form of tuberculosis is very slow and incidious in its onset and it is generally an accepted fact that these cases are ill at least twelve to 18 months prior to consulting a physician. He also makes mention of the fact that there were other men who later developed tuberculosis but one of these we might add, was unconfirmed. This form of contact with an ambulant case, is delving into the possibility which is most remote. For a long time I have attempted to show that a marked differentiation should be made between casual and intense exposure. By the latter I mean hospital personnel or one working in a tuber-

culosis ward. The casual exposure to which this man was subjected is the same type of exposure which each of us experiences practically every week of our life. It is my opinion that this is an old reactivated type of tuberculosis. There is nothing in medical literature which states that the rainy season in the tropics or elsewhere predisposes to the development of any upper respiratory or deep respiratory disease. If the rains and the wetting are to be attributed as causative factors, there should be an associated pneumonia or repeated colds, something which would act as a decided contributing factor. There is one other factor which is important and which I would like to stress. That is the type of infiltration which involves the upper portion of either chest. There is a definite granular appearance in both the right and left chest which is characterized by chronicity and it is my belief that this condition antedates many months his employment at Pacific Naval Air Base. After thoroughly scrutinizing all the facts incident with the case, I believe an unbiased opinion would be that industry had no connection with the man's unfortunate and present incapacity.

Very truly yours,

(Signed) FRANK PORTER MILLER
Frank Porter Miller, M.D.

FPM:RU

United States Employees' Compensation
Commission
13th Compensation District

DB-P-1-8359

In the matter of the claim for compensation under the Act of Congress of August 16, 1941. Defense Bases Act)

WILLIAM DONOHO,

Claimant,

against

CONTRACTORS, PACIFIC NAVAL AIR BASES,

Employer.

LIBERTY MUTUAL INSURANCE COMPANY,
Insurance Carrier.

COMPENSATION ORDER
AWARD OF COMPENSATION

Claim for compensation having been filed herein under the Act of Congress of August 16, 1941, for an injury occurring in the course of an employment on a military, air or naval base of the United States outside the continental United States, in the Pacific Compensation District, in the Territory of Hawaii, and said claim having been transferred to the undersigned Deputy Commissioner, 13th Compensation District, by the Deputy Commissioner of said Pacific Compensation District, with the approval of the United States Employees' Compensation Com-

mission, and such investigation in respect to the above entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

FINDINGS OF FACT

That between March and September, 1942, the claimant above named was in the employ of the employer above named for the performance of service at a military base in a possession of the United States in the South Pacific region, in the Pacific Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act as extended by said Act of Congress of August 16, 1941, and that the liability of the employer for compensation under said Acts was insured by Liberty Mutual Insurance Company;

That while employed on said base claimant contracted an active pulmonary tuberculosis as a result of conditions of his employment as follows: Upon arriving at the base in March 19, 1942, claimant worked a short time as a male nurse. When the work was taken over by military authorities claimant worked for some weeks driving a truck. In the course of this work during the rainy season which prevailed at that time, he was wet through four or five times a day by rain. After some weeks he was assigned to work as a steward of the mess hall and continued in such capacity until he left the base in September. During this time he worked at least 12 hours a day and at times sixteen to eighteen

hours a day. The temperature at said base was between 90 and 100 degrees with high humidity most of the time. After working at said base two or three months he commenced to feel great fatigue which has continued from that time. He arrived at California after completion of his contract on September 25, 1942 and has done no work since because of said fatigue. In the Spring of 1943 he was examined for military service at which time he was found to be suffering from active pulmonary tuberculosis and was put in a hospital shortly afterwards. He is still hospitalized at the present time. That said active tuberculosis was caused to develop and become disabling either by contraction of original infection from unknown sources or by reactivation of a previous undiscovered and arrested pul monary tuberculosis, by conditions of his employment above mentioned, principally overwork and exposure;

That defendants had notice of claimant's contention within proper time;

That the employer did not furnish claimant with medical treatment, etc., in accordance with Section 7(a) of the said Act, after being notified of its discovery; That claimant was thereafter hospitalized in the Los Angeles County tuberculosis hospital at Olive View; That defendants are liable for the reasonable cost of said care, if charge be made therefor, the amount to be fixed by further proceedings if the parties are unable to agree thereon.

That the average annual earnings of the claimant herein at the time of his injury exceeded the maxi-

mum sum proscribed by said Act of $1950.00, his actual earnings in said employment being $85.00 a week;

That as the result of the injury sustained the claimant was wholly disabled from September 25, 1942 indefinitely, and he is entitled to compensation at $25.00 a week for such disability to and including the date of the hearing. October 6, 1943, 53 6/7 weeks, amounting to $1346.42, and thereafter at said rate until the termination of his disability or the further order of the Deputy Commissioner. That no compensation has been paid;

Upon the foregoing facts, the Deputy Commissioner make the following:

AWARD

That the employer, Contractors, Pacific Naval Air Bases, and the insurance carrier, Liberty Mutual Insurance Company, shall pay to the claimant compensation as follows: The sum of $1346.42 forthwith, as of October 6, 1943, and the further sum to claimant of $25.00 a week thereafter, payable in installments each two weeks until the further order of the Deputy Commissioner.

Given under my hand at San Francisco, California, this 24th day of February, 1944.

WARREN H. PILLSBURY
Deputy Commissioner
13th Compensation District.

WH.P:pr

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Compensation Order—Award of Compensation was sent by registered mail to the claimant, the employer and the insurance carrier at the last known address of each as follows:

Mr. William Donoho, Olive View Sanitarium, San Fernando, Cal.

Contractors, P.N.A.B., 2129 Grove St., Oakland, 4, Calif.

Liberty Mutual Ins. Co., 714 S. Hill St., Los Angeles, Calif.

By regular mail to:

Mr. Claude F. Weingand, Attorney, 939 Rowan Bldg., Los Angeles, California.

Mr. C. B. Morris, Attorney, Mills Bldg., San Francisco, Calif.

Mr. A. J. Cyr, Acting Deputy Commissioner, U.S.E.C.C., 407 Hawaiian Trust Building, Honolulu, 48, T. H.

United States Employees' Compensation Commission, Attention: Mr. W. D. Driscoll, Asst. Sec., 285 Madison Avenue, New York, 17, N. Y.

Mailed

.....

Deputy Commissioner

[Endorsed]: No. 10950. United States Circuit Court of Appeals for the Ninth Circuit. Contractors, Pacific Naval Air Bases and Liberty Mutual Insurance Company, a corporation, Appellants, vs. Warren H. Pillsbury, Deputy Commissioner, United States Employees' Compensation Commission for the Thirteenth Compensation District and William Donoho, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed December 20, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10950

CONTRACTORS, PACIFIC NAVAL AIR BASES and LIBERTY MUTUAL INSURANCE COMPANY, a corporation,

Complainants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, United States Employees Compensation Commission for the Thirteenth Compensation District, and WILLIAM DONOHO,

Respondents.

STATEMENT OF POINTS ON APPEAL

Appellants Contractors Pacific Naval Air Bases and Liberty Mutual Insurance Company, a corporation, do hereby formally adopt the Statement of Points upon which Appellants Intend to Rely in the appeal of this case filed by them in the above entitled case with the Clerk of the United States District Court for the Northern District of California, Southern Division, as appellants' Statement of Points upon this appeal.

Dated December 28, 1944.

CLAUDE F. WEINGAND
By [ILLEGIBLE]
Attorney for Appellants

[Endorsed]: Filed Dec. 29, 1944. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD TO BE PRINTED

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellants hereby designate for the printed record the following parts of the certified transcript of the record on appeal in the above entitled matter:

1. Complaint for Injunction.
2. Motion to Dismiss Bill of Complaint.
3. Order of Dismissal dated September 13, 1944.
4. Transcript of Testimony in above cause and at hearing before United States Employees Compensation Commissioner Warren H. Pillsbury, Deputy Commissioner, Thirteenth Compensation District held October 6, 1943.
5. Notice of Appeal.
6. Supersedeas and Cost Bond on Appeal.
7. Designation of Record on Appeal.
8. Statement of Points Upon Which Appellants intend to Rely in the appeal in this case.
9. Clerk's Certificate.
10. Statement of Points on Appeal After Filing in Circuit Court of Appeals.
11. This Designation of Part of Record to be Printed and Filed in Circuit Court of Appeals.

Dated this 28th day of December, 1944.

CLAUDE F. WEINGAND,
Attorney for Appellants

[Endorsed]: Filed Dec. 29, 1944. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ADDITIONAL DESIGNATION OF PARTS OF RECORD TO BE PRINTED

Respondents hereby designate for the printed record, in addition to all designations requested by the Complainants, the complete file of the United States Employees' Compensation Commissioner on file herein, including the Findings of Fact and Award of Compensation.

Dated: This 6th day of January, 1945.

FRANK J. HENNESSY
United States Attorney.

[Endorsed]: Filed Jan. 6, 1945. Paul P. O'Brien, Clerk.

No. 10950

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CONTRACTORS, PACIFIC NAVAL AIR BASES and LIBERTY MUTUAL INSURANCE COMPANY, a corporation,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, United States Employees' Compensation Commission for the Thirteenth Compensation District, and WILLIAM DONOHO,

Appellees.

OPENING BRIEF OF APPELLANTS.

On Appeal From the District Court of the United States for the Northern District of California, Southern Division

CLAUDE F. WEINGAND,
939 Rowan Building, Los Angeles 13,
Attorney for Appellants.

FILED
FEB 19 1944
PAUL P. O'BRIEN,

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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No. 10950

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CONTRACTORS, PACIFIC NAVAL AIR BASES and LIBERTY MUTUAL INSURANCE COMPANY, a corporation,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, United States Employees' Compensation Commission for the Thirteenth Compensation District, and WILLIAM DONOHO,

Appellees.

OPENING BRIEF OF APPELLANTS.

Statement of the Case.

Between March and September of 1942, appellee William Donoho, was employed at a military base outside of the United States, to-wit: Samoa. He claims to have contracted pulmonary tuberculosis while working there for appellant, Contractors, Pacific Naval Air Bases. For this illness he sought compensation on his return to the Continental United States.

His application resulted in a compensation order made on Feb. 24, 1944, by Warren H. Pillsbury, Deputy Commissioner, United States Compensation Commission for

the Thirteenth Compensation Commission District (hereinafter referred to as the "Deputy Commissioner").

Appellants being dissatisfied with the compensation order and deeming it to be contrary to law, thereupon filed their Complaint for Injunction in the District Court of the United States, Northern District of California, Southern Division, on July 6, 1944, as authorized by 42 *U. S. C. A.* 1651 to 1654 and *U. S. C. A.* 33, par. 921, claiming that the order was contrary to law in the following particulars:

> "(a) That there was no substantial evidence to warrant the Findings of Fact in said order that said respondent Donoho while employed, as in said Compensation Order alleged, contracted pulmonary tuberculosis as a result of conditions of his employment.
>
> "(b) That there is no substantial evidence to support the Findings of Fact that claimant is entitled to compensation at the rate of $25.00 per week or any other rate.
>
> "(c) That said Finding of Fact, and particularly those portions thereof which read: 'That said active tuberculosis was caused to develop and became disabling either by contraction of original infection from unknown sources or by reactivation of a previous undiscovered and arrested pulmonary tuberculosis, by conditions of his employment above mentioned, (6) principally overwork and exposure' do not support the Award of Compensation made in said Compensation Order." [R. 8-9.]

To this complaint the Deputy Commissioner interposed a Motion to Dismiss Bill of Complaint [R. 12-13] which was granted in an Order Dismissing Bill [R. 14] after Points and Authorities, together with a Transcript of the Testimony taken at the hearing before the Deputy Com-

missioner had been furnished to the United States District Court in San Francisco. The case is before this Honorable Court following the Order Dismissing Bill filed September 13, 1944, which is in the nature of a final judgment.

Jurisdictional Statement.

1. Compensation orders made pursuant to the Defense Bases Act of August 16, 1941, as amended December 2, 1942 (42 *U. S. Code* 1651 to 1654) may be judicially reviewed in the same manner as awards made under the Longshoremen's and Harbor Workers Compensation Act.

42 *U. S. Code* 1653, subdivision b.

2. Therefore a complaint for injunction is the proper method to seek a judicial review of compensation orders made by a Deputy Commissioner of the United States Employees' Compensation Commission under the provisions of the Defense Bases Act; and a compensation order made by the Deputy Commissioner may be set aside if it is "not in accordance with law."

U. S. C. A. 33, par. 921.

3. This Honorable Court has jurisdiction to review the judgment of dismissal of the United States District Court under Section 225(a) providing:

> "The Circuit Court of Appeal shall have appellate jurisdiction to review by appeal final decisions— First: In the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title."

U. S. C. A. 28, par. 225(a).

Assignment of Errors.

1. The District Court erred in making, signing and filing its order denying complainants' request for an injunction.

2. The District Court erred in making, signing and filing its order granting respondents' motion to dismiss the Bill of Complaint.

Questions Presented on Appeal.

1. Is there sufficient substantial evidence in the record to warrant the Deputy Commissioner's Finding of Fact that Appellee Donoho, while employed on the Island of Samoa, sustained injury by reason and in the course of his employment consisting of pulmonary tuberculosis?

2. Is a Finding of Fact in the alternative and speculative in its nature, reading as follows:

> "That said active tuberculosis was caused to develop and became disabling *either* by contraction of original infection from unknown sources *or* by reactivation of a previous undiscovered and arrested pulmonary tuberculosis, by conditions of his employment above mentioned, principally overwork and exposure"

sufficient to support a compensation award giving the applicant compensation for his condition?

ARGUMENT.

It is the position of appellants that the evidence before the Deputy Commissioner as reflected in the record before this Court [R. 27-67] does not contain substantial evidence to warrant the findings that Appellee Donoho sustained industrial injury entitling him to an award of compensation. Appellants claim that while findings of fact by the deputy commissioner are conclusive when based on evidence, an award is a nullity and must be set aside as a matter of law if there is no substantial evidence to support or warrant the findings of fact made.

It is likewise the position of appellants that findings of fact in the alternative leaving us in the dark as to the time and manner of contracting a disease and as to the time of its manifestation is the outcome of speculation, defective, and insufficient in law to sustain an award of compensation.

I.

A Compensation Order Must Be Supported by Substantial Evidence.

While it is the law that findings of fact of the Deputy Commissioner are binding upon the Appellate Court when supported by evidence, it is likewise the law that a compensation order is not in accordance with the law if it is not supported by substantial evidence.

We shall not cite from the numerous cases which hold that the Longshoremen's and Harbor Workers' Compensation Act shall be liberally construed in favor of the employee, nor shall we refer to cases which hold that the

compensation order will be sustained as long as it is supported by substantial evidence, because these principles have become well established in administrative law.

It is, however, equally well established that *there must be more than a scintilla of evidence to support the findings of fact,* that is to say, it is well settled that *the evidence must be substantial.* If it does not measure up to that standard, the courts in reviewing the action of an administrative tribunal will deem the findings of fact to be contrary to law. This rule has been uniformly adopted in all appellate reviews of administrative orders, but since we are bound in the present instance by the law applicable to review under the Longshoremen's and Harbor Workers' Compensation Act, we call attention only to cases which involve that legislation.

In *Speaks v. Hoage,* 78 F. (2d) 208, involving an appeal from such a compensation order the court said:

> "In Powell v. Hoage, 61 App. D. C. 99, 57 F. (2d) 766, 767, we said: 'We therefore reach the conclusion that the cases in which we may set aside an order of the Commissioner as "not in accordance with law" are only those in which it appears that there is an error of law, or in which the order of the Commissioner is not supported by substantial evidence, as well, of course, in those in which it is arbitrary and unreasonable. If the finding, however, is supported by substantial evidence, it is final.' "

The same rule was stated in similar language in *New Amsterdam Casualty Co. v. Hoage,* 47 F. (2d) 837, and

in *Liberty Mutual Insurance Co. v. Hoage,* 65 F. (2d) 822, besides many others to which there is no need to refer.

The power of the Deputy Commissioner in connection with the evidence is not arbitrary. While orthodox rules of evidence may be relaxed and while he is entitled to draw all legitimate inferences from the facts proved, he must view the evidence with a judicial mind. He is not allowed to indulge either in conjecture or speculation, and if he does indulge in conjecture, his order cannot be said to be in accordance with law and must be set aside. This was clearly expressed in *New Amsterdam Casualty Co. v. Hoage,* 46 F. (2d) 837, where the court said:

> "To infer that, when he sought permission to go up the street on a little business, he meant that he was going out to make an emergency purchase for the company, that he cashed the check for the purpose of obtaining money to pay for that purchase, and, when killed, was on his way to make the purchase, is to indulge in pure conjecture, inconsistent with the established facts. *An award based upon conjecture inconsistent with established facts and circumstances is manifestly so arbitrary and unreasonable as to be 'not in accordance with law.'* See Wheeling Corrugating Co. v. McManigal (C. C. A.) 41 F. (2d) 593, 594; Matter of Eldridge v. Endicott, Johnson & Co., 228 N. Y. 21, 25, 126 N. E. 254, 20 A. L. R. 1." (Italics ours.)

II.

No Industrial Accident Being Involved, the Order Cannot Be Sustained, Unless the Record Reveals "Such Occupational Disease or Infection as Arises Naturally Out of Such Employment." (33 U. S. C. A. Sec. 902(2).)

The appellee in the case before the Court claimed to have contracted tuberculosis while on the Island of Samoa. The findings are not clear, containing a provision in the alternative, that a dormant condition of tuberculosis may have been reactivated by appellee's occupational labors while on the island in question. As the evidence will show, it is not claimed that the cause of the tuberculosis was traumatic or that the condition was brought about by an industrial injury sustained in the course of the employment. Appellee is not entitled to an award therefor *unless he* brings himself within the language of the statute and *shows that he sustained an "occupational disease or infection" and that such occupational disease or infection arose "naturally out of such employment."*

It follows, therefore, logically and unavoidably that the disease must be associated with the employment, such as silicosis with work in a mine, plumbism or lead poisoning or glass blower's arm in the various occupations to which these are incident, all of which have the common characteristic that they are *"peculiar to the occupation engaged in by by the employee and * * * due to causes different from the ordinary hazards of employment as such. It arises from causes inherent in the nature and mode of work of a particular profession or industry, and represents the usual result or concomitant overwork of this nature." Campbell Workmens' Compensation*, Vol. 1, Par. 350. (Italics ours.)

Recent cases, especially in the State of California—and no one could well claim that the Supreme Court of the State of California is not liberal in its interpretation of compensation laws—have evolved the test that there must be a special exposure to the disease. In other words, the incidence of the disease must be greater among men engaged in the particular occupation than among the people in general in the commonalty in which the labor is performed. The most recent of these cases is *Bethlehem Steel Co. v. Industrial Accident Commission,* 21 Cal. (2d) 742, 135 Pac. (2d) 153, in which it is said:

> "It is well established in this state that compensation is not due merely for injury caused by disease contracted by an employee while employed. The injury must be one arising out of the employment, and where the injury is by disease, there must exist the relation of cause and effect between the employment and the disease. It is also true that to justify an award there must be an affirmative showing of a case within the statute and it must affirmatively appear that there exists a reasonable probability that the employee contracted the disease because of his employment. (San Francisco v. Industrial Acc. Com., 183 Cal. 273, 282 (191 P. 26).) It must further be shown that the disease contracted was not merely a hazard of the community but that the employee was subjected to some special exposure in excess of that of the commonalty. In the absence of such showing, the illness of the employee cannot be said to have been proximately caused by an injury arising out of his employment or by reason of a risk or condition incident to the employment. (Pattiani v. Industrial Acc. Com., *supra;* Pacific Employers Ins. Co. v. Industrial Acc. Com., *supra.*) The employee's risk of contracting the disease by virtue of the employment must be materially greater than that of the general

public, *i. e.*, the injury must be a natural or a reasonably probable result of the employment or of the conditions thereof. (Storm v. Industrial Acc. Com., 191 Cal. 4 (214 P. 874); Hartford Acc. & Ind. Co. v. Industrial Acc. Com., 140 Cal. App. 482 (35 P. 2d 366); Campbell's Workmen's Compensation, vol. 1, p. 248, sec. 247.)"

Other cases to the same effect from this jurisdiction are:

Pac. Employers Ins. Co. v. Industrial Acc. Com., 19 Cal. (2d) 622, 122 Pac. (2d) 570;

Childrens' Hospital v. Industrial Acc. Com., 22 Cal. App. (2d) 365, 71 Pac. (2d) 83.

This need of a special exposure is particularly applicable to cases of tuberculosis. In the last analysis the question of whether conditions of employment produces a greater incidence of tuberculosis among workers than is found among the commonalty in general in the locality where the work is performed, is a question of medical statistics.

It becomes plain from the undisputed rules concerning occupational diseases which have been just stated, that while tuberculosis may in some instances be held to be occupational in origin and, therefore, compensable, special conditions must be proved where that result is to follow. Such special circumstances were shown in the case of *Grain Handling Co., Inc., et al. v. Sweeny, et al.*, 102 F. (2d) 464, in which a preexisting condition of tuberculosis was reactivated by the inhalation of grain dust, a condition peculiar to that employment. In the majority of cases, however, that result cannot and does not follow, especially since the answer to the question whether the tuberculosis is occupationally caused must depend on

speculation. Thus exposure to tropical rain and heat, and varying temperatures do not produce this disease any more readily in a steward or male nurse than in any other occupation carried on in that community. A good discussion of this situation, where an award was *denied,* is found in *Hartford v. Industrial Acc. Com.,* 140 Cal. App. 432, 35 Pac. (2d) 366, in which it was claimed that:

> ". . . the testimony showed that employee Houlihan began working for the company in October of 1929 and continued until July, 1933, his title being that of shipping clerk, and included work in the office, cooler, smoke room and outside, which exposed him to extremes of heat and cold, smoke, ammonia gas and inclement weather. When he started such work he was healthy. Two years afterward he was examined for insurance and there is no evidence that tuberculosis was discovered. After some further time he started to lose weight, appetite and endurance, and later had 'pleurisy trouble' and 'colds.' He first knew he had tuberculosis on June 20, 1933, and was obliged to stop work early in July. There is no question that the employee was suffering from pulmonary tuberculosis which rendered him temporarily totally disabled. The evidence does not show that it was due to his employment.
>
> "The report of the assistant medical director for the commission was as follows: 'According to the record, this applicant was subjected to more than the usual hazard experienced by one in his type of employment. It is possible that continual exposures described would have predisposed to the lighting up of an inactive pulmonary tuberculosis. Naturally, such an opinion is merely surmise and conjecture. However, one can state positively that the duties of his employment as described would not be beneficial to him if he were susceptible to a tuberculosis lesion.'

"Petitioners' physician examined Houlihan and reported in part as follows, as to the cause of the tuberculosis: Dr. Campbell: 'The question as to the cause in this particular case is blamed on the hazard of his occupation where he spends an average of 8 or 9 hours daily but the balance of the time is free to do whatever he cares to. Why penalize the place where he was employed 8 or 9 hours a day and attach no importance to his home life, environment and habits during the balance of the day? A general answer to the question is that any condition that lowers the tone of the general system renders the tissues susceptible to the changes produced by the tubercle bacillus. The latter is of course the direct cause, a susceptibility to its influence may be acquired by heredity, syphilis, alcoholism, occupations such as the inhalation of foul air and irritating particles, residence in damp or overcrowded apartments, catarrhal inflammation of the respiratory tract or debility from any infectious disease, etc.' Dr. Smith: 'That this man is tuberculous is proved and he is now undergoing the proper treatment for his condition. That this condition is related to his employment in industry is extremely questionable, in my opinion. Tuberculosis is an infectious disease. This claimant does not set forth in any way any claim or any evidence to substantiate any claim that he was infected with tubercle bacilli while in his employment, and I know of nothing in such employment that would cause such infection. Just where he picked up the infection of tubercle bacilli is undoubtedly unknown to him and likewise to me; therefore I am of the opinion that his infection causing tuberculosis cannot be traced to his employment in industry. Whether or not his occupation contributed to his present condition in so far as it may be claimed that employment in a "cooler" may have brought about activity of a smoldering tuberculous infection, must be considered.

I know of no evidence to support such claim, and know of no reason why the mere presence of an individual in a room of this character should be more prone to develop tuberculosis. He makes no claim of any injury to his body but apparently is entirely dependent on the fact that he was working in a "cooler" in a packing house. At best a patient doing such work spends much less time at his occupation than he does outside his occupation, which hours are spent in rest and amusements which could just as readily be a factor in the development of tuberculosis as his work. I am therefore of the opinion that there is no relationship between the occupation in industry of this claimant and the tuberculosis from which he now suffers.'

". . . An injury, in order to be compensable under the terms of the Compensation Act, must have been sustained by the employee 'arising out of and in the course of the employment,' and must have been 'proximately caused by the employment.' (*Storm v. Industrial Acc. Com.*, 191 Cal. 4 (214 Pac. 875). It is not suggested in this case that any accident had occurred which had caused or contributed to applicant's condition. 'While the word "accident" has been eliminated from section 6 of the Workmen's Compensation Act, the phrase "arising out of and in the course of the employment" has been interpreted to mean that the injury must result by reason of the employment in which the employee is engaged, and not by reason of some inherent natural defect which simply culminates during the time of employment. . . . There is no presumption as contended by respondents that because an injury occurs in the course of the employment it arises out of or because of that employment.' (*Newton v. Industrial Acc. Comm.*, 204 Cal. 185; 267 Pac. 542, 60 A. L. R. 1279.) 'The burden is upon the applicant for

compensation to show that the injury arose out of as well as in the course of the employment.' (*Eastman v. Industrial Acc. Com.,* 186 Cal. 587, 593; 200 Pac. 17, 19.)

"In this case we have an employee suffering from pulmonary tuberculosis, a disease which for years has been studied, diagnosed and treated by those members of the medical profession whose research and experience have qualified them for that service and to whose judgment as experts on the subject of the disease their fellow practitioners defer. 'The rule,' as stated in *Simpson v. Industrial Acc. Com.,* 74 Cal. App. 239, 243; 240 Pac. 58), 'appears to be that whenever the subject under consideration is one within the knowledge of experts, only, and is not within the common knowledge of laymen, the expert evidence is conclusive upon the question in issue. It follows that in such cases neither the court nor the jury can disregard such evidence of experts, but on the other hand they are bound by such evidence even if it is contradicted by nonexpert witnesses. The same rule would of course apply to a proceeding before the industrial accident commission.' Testimony of probative value sufficient to support applicant's claim is entirely lacking. No expert witness has expressed an opinion that it is even reasonably probable that the condition of applicant was due to his employment, and an award may not be predicated upon a possibility which is 'merely surmise and conjecture.' It is not sufficient that the referee or commission be satisfied as laymen of the correctness of their view, but the law requires that they shall reach their conclusion on the basis of legally competent evidence. A mere surmise or conjecture does not constitute 'a foundation sufficient to support a finding of fact.' (*Simpson v. Industrial Acc. Comm., supra.*)

"The award is annulled."

III.

A Review of the Evidence Available to the Deputy Commissioner Shows That There Is No Substantial Evidence to Support the Conclusion That Appellee's Tuberculosis Was an Occupational Disease or Infection Arising Naturally Out of His Employment.

It remains for this Honorable Court to match the evidence contained in the record against the foregoing well established principles.

There were only two witnesses who testified on behalf of the appellee. It is true that a report was filed by a medical expert on behalf of appellants, but inasmuch as this report is favorable to appellants and since the case of William Donoho derives no strength from it, we shall not summarize it but restrict ourselves only to such testimony as is shown from the record to have been given by and on behalf of the employee.

The applicant testified that pursuant to contract he went to an Island Defense Base in the Pacific as a male nurse. [R. p. 5.] When he got there he went to work driving a truck. After approximately three months he felt constant fatigue. [R. p. 5.] He had a physical examination before he left and his lungs were found to be normal. [R. p. 8.] After his return he was fluoroscoped and X-rayed and sputum tests were made, all of which were found positive for tuberculosis. [R. p. 7.]

At the Island, applicant was subjected to excessive rain (190 inches a year), making outside working conditions disagreeable, so that he became soaked four or five times a day during the rainy season. After he drove the truck for a while [R. p. 9] he took the steward's place and was in charge of the Mess Hall, working

twelve, sometimes sixteen to eighteen hours, a day. [R. p. 10.] The temperature was around 90 to 100 degrees, with humidity very high. [R. p. 11.]

With respect to possible sources of infection, the testimony of the applicant was vague. He testified that native employees were working around the Mess Hall, who got sick and "I think tuberculosis among the natives in the Island might be common." However, he knew of no natives who actually had tuberculosis. [R. p. 11.] He testified that among approximately 300 white employees [R. p. 14] he knew of one whose case was diagnosed as tuberculosis [R. p. 12]; and as to another, the witness said "I understand the Navy authorities diagnosed his condition as tuberculosis," but he could not say definitely whether he had it or not. [R. p. 13.] Neither of these individuals coughed, to his knowledge. [R. p. 13.] However, no employee that had tuberculosis shared a room with the applicant [R. p. 15], and of the two cases just mentioned, the applicant lived with neither one, nor did he have close contact with either of them. [R. p. 20.]

Dr. Ford testified that the applicant was suffering from advanced pulmonary tuberculosis, which could have developed since March, 1942. [R. p. 25.] It is not possible to state from the X-rays or evidence whether there may have been an earlier or arrested inactive condition. [R. p. 25.] The witness was unable to express an opinion as to whether the case was one of primary tuberculosis, starting about the summer of 1942, or whether it might be a reactivation of an earlier condition. [R. p. 26.] He further stated: "Of course, it is not possible to develop tuberculosis without exposure to the tubercle bacillus." [R. p. 26, lines 16 to 20.] He stated further that it was possible to contract tuberculosis through casual contact.

However, he could not say that this was the case here. [R. p. 27.]

When asked whether the onset of acute fatigue would make it more possible that the disease was contracted in the fall or summer of 1942, the witness answered:

> "A. Well, that is the first subjective symptom. That is the first thing he noticed, his fatigue, and that is a common symptom of active tuberculosis. I cannot say that the disease started at this time, although it is quite possible that it did.
>
> Q. In view of the whole history it is not a little more likely that it started at the time this fatigue started? A. I would think so."

The witness further stated that it was "quite possible" that a man could develop as much tuberculosis as the applicant had within a period of six months. [R. p. 30.] With respect to the exposure to bad weather, as a responsible factor, the witness stated: "I think that if he is exposed to bad weather the effect would be the same here as in the Tropics." [R. p. 31.]

In no respect can the foregoing testimony be said to rise above the level of speculation and conjecture. Certainly there is no evidence whatever that the exposure to tuberculosis on the part of Mr. Donoho was greater than that of the people on the island of Samoa in general. Tuberculosis is not a tropical disease and not confined to the regions in which Mr. Donoho was working. The risk to which he was exposed is not shown to be any different or any greater than that to which he would have been exposed had he driven a truck or run a mess hall anywhere in the United States. Exhaustion and overwork are not conditions peculiar to his employment, but

are incidents of all occupations in which physical work or long hours, or both, are demanded of the employees.

It is well known, as the report of appellants' expert shows, that tuberculosis is no respecter of age, occupation, sex or clime. We respectfully submit, therefore, that the compensation order, whether it is construed to mean that the appellee contracted tuberculosis on the Island of Samoa, or whether it is said to mean that he had an arrested case of tuberculosis which flared up in Samoa is not supported by substantial evidence and that therefore, as a matter of law, the award must be set aside.

IV.

A Finding of Fact Showing the Cause of the Injury in the Alternative Does Not Support a Compensation Order.

The deficient state of the evidence and the confusion in which one's mind—including the mind of the Deputy Commissioner—is left thereby, is best illustrated by his finding, reading as follows:

> "That said inactive tuberculosis was caused to develop and become disabling either by contraction of an original infection from unknown sources or by reactivation of a previously undiscovered and arrested pulmonary tuberculosis, by conditions of his employment above mentioned, particularly overwork and exposure."

This is a finding in the alternative and, as such, is objectionable. If nothing further were done the case should be remanded to the Commissioner in order to

make a finding electing between the alternatives quoted above.

The reference in the finding quoted above to an infection "from unknown sources" is a profession of the Commissioner's inability of the fact of causation and is, therefore, not a finding of fact. It should be disregarded.

This leaves as an alternative only the Commissioner's reference to "reactivation of a previously undiscovered and arrested pulmonary tuberculosis." There is as to that finding not one scintilla of evidence to sustain it. A fluoroscopic physical examination was given to the applicant prior to his departure for the island and, moreover, there appears on page 8 of the Record the result of a medical examination on February 22, 1942, which was based on a complete blood test and fluoroscopic examination, to the effect that the lungs are normal and that there was no previous history of tuberculosis. [R. p. 8, lines 19 to 23.] This was the applicant's evidence, which was further substantiated by his own medical expert, to the effect as already quoted, that from the medical standpoint this was a mixed type of tuberculosis, but that it was impossible to state whether there may have been an earlier or arrested or inactive condition. [R. p. 25, lines 17 f.]

That an award in the alternative is objectionable, especially since neither of the alternatives bring the claimant's case with the purview of the act, is well demonstrated in the case of *Greenberg v. Greenberg*, 193 App. Div. 574, where the deceased had been killed in an

elevator which he was using to bring material to an upper floor.

> "The evidence was such that it was not known whether the deceased attempted to stop the elevator or whether the mechanism was so jarred or struck that it automatically began to operate. In this dilemma the Industrial Commission made the alternative finding that:
>
> " 'The said elevator was set in motion either by the deceased attempting to run the same or the mechanism of the same having got caught in the large sheets of canvas that were being taken to the upper floors.' "

The New York Court said:

> " 'Having made no decision between the two alternatives expressed, the commission has not eliminated the contingency that the deceased was killed by running the elevator himself. We express no opinion as to whether the evidence would bear the construction that the elevator started automatically preferring as the wiser course the remission of the case to the commission, not only for corrected findings but for the taking of further proof if the same appeared desirable.' "

Conclusion.

It is respectfully submitted that the record does not support a finding of fact that the misfortune of appellee William Donoho was caused by a special hazard or exposure which in the natural course of events produced tuberculosis as an occupational disease.

It is further respectfully submitted that a lack of evidence and the conjectural nature of the compensation order are reflected in the Deputy Commissioner's finding of

fact in the alternative leaving the cause of the disease and the possibility of its occupational origin entirely in the air, and that therefore said finding in the alternative does not support an award in favor of the claimant.

It is naturally deplorable that a man, apparently healthy when leaving the mainland, should find himself in this unfortunate condition, but the larger aspects of the situation dictate that the Defense Bases Act, truly an industrial compensation act, comprising accidental injury and occupational disease, should not be converted into a health insurance measure. Congress obviously did not have that intention, and it should not be read into the act by judicial interpretation.

For the foregoing reasons, it is respectfully submitted that the District Court erred in dismissing the complaint and denying injunction.

Respectfully submitted,

CLAUDE F. WEINGAND,

Attorney for Appellants.

No. 10,950

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CONTRACTORS, PACIFIC NAVAL AIR BASES and LIBERTY MUTUAL INSURANCE COMPANY (a corporation),

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, United States Employees' Compensation Commission for the Thirteenth Compensation District, and WILLIAM DONOHO,

Appellees.

Appeal From the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE PILLSBURY, DEPUTY COMMISSIONER.

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No. 10,950

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CONTRACTORS, PACIFIC NAVAL AIR BASES and LIBERTY MUTUAL INSURANCE COMPANY (a corporation),

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, United States Employees' Compensation Commission for the Thirteenth Compensation District, and WILLIAM DONOHO,

Appellees.

Appeal From the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE PILLSBURY, DEPUTY COMMISSIONER.

STATEMENT OF CASE.

This is an appeal from the action of the District Court upon judicial review of a compensation order filed on February 24, 1944, by the Deputy Commissioner Warren H. Pillsbury, appellee herein, in which he awarded compensation to William Donoho for disability from tuberculosis resulting from his employ-

ment by Contractors, PNAB, appellant, in the Samoan Island. The compensation liability was insured by the appellant, Liberty Mutual Insurance Company. The said compensation order was issued by the deputy commissioner pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (44 Stat. 1424; U.S.C., Title 33, Ch. 18, sec. 901, *et seq.*), as made applicable to persons employed at certain defense base areas and other places by the Act of August 16, 1941. (55 Stat. 622; 42 U.S.C.A. secs. 1651-1654.)

William Donoho (hereafter called "claimant") left the United States in February 1942, for the Samoan Island and was employed there from March 1942, to September 1942. When he returned to the United States he was ill, and it was ascertained that he suffered from tuberculosis. He filed claim for compensation claiming that his condition was due to his employment. The employer and carrier controverted the claim upon the ground that the condition did not arise out of and in the course of the employment. A hearing was held before the deputy commissioner on October 6, 1943, at which both sides offered evidence with respect to said issue. Upon the evidence adduced before him, the deputy commissioner issued the compensation order of February 24, 1944 (complained of), in which he found that the condition was caused or activated by the employment.

The employer and carrier thereupon instituted a proceeding to review the compensation order pursuant to the provisions of section 21(b) of the Longshore-

men's Act (33 U.S.C.A. sec. 921(b)), alleging in substance that the compensation order is not in accordance with law because there was no evidence to support the finding that claimant contracted tuberculosis as a result of his employment.

A motion to dismiss the complaint was filed on behalf of the deputy commissioner. The cause came on for a hearing before Honorable A. F. St. Sure, United States District Judge for the Northern District of California, Southern Division, who by order and judgment dated and filed on September 13, 1944, granted the motion and dismissed the complaint. It is from this order that the present appeal is taken.

ARGUMENT.

I.

THE FINDING OF FACT OF THE DEPUTY COMMISSIONER TO THE EFFECT THAT THE EMPLOYEE SUSTAINED A COMPENSABLE INJURY, IS SUPPORTED BY EVIDENCE, AND THUS SUPPORTED, IS FINAL AND CONCLUSIVE.

(a) General Principles.

Before proceeding to indicate the evidence which supports the finding of the deputy commissioner, it may not be inappropriate to invite the Court's attention to the following well established principles of compensation law:

The Longshoremen's Act should be liberally construed in favor of the injured employee or his dependent family: *Baltimore & Philadelhpia Steamboat Co. v. Norton, deputy commissioner,* 284 U. S. 408 (1932);

Fidelity & Casualty Co. of New York v. Burris, 61 App. D. C. 228, 59 F. (2d) 1042 (1932); *Associated General Contractors of America, Inc., et al. v. Cardillo, deputy commissioner,* 70 App. D. C. 303, 106 F. (2d) 327 (1939); *DeWald v. Baltimore & O. R. Co.,* 71 F. (2d) 810 (C.C.A. 4, 1934), certiorari denied October 8, 1934, 293 U. S. 581.

In the absence of substantial evidence to the contrary the presumption is "That the claim comes within the provisions of this Act"; section 20(a) of the Longshoremen's Act.

The burden is on the plaintiff to show that there was no evidence before the deputy commissioner to support the compensation order complained of in the bill: *Grant v. Marshall, deputy commissioner,* 56 F. (2d) 654 (D. C. Wash. 1931); *United Employees Casualty Co. v. Summerous,* 151 S. W. (2d) 247 (Tex. 1941); *Nelson v. Marshall, deputy commissioner,* 56 F. (2d) 654 (D. C. Wash. 1931); *Gulf Oil Corporation v. McManigal, deputy commissioner,* 49 F. Supp. 75 (D. C. N. D. W. Va. 1943).

Logical deductions and inferences which may be and are drawn by the deputy commissioner from the evidence should be taken as established facts and are not judicially reviewable: *Liberty Mutual Ins. Co. v. Gray, deputy commissioner,* 137 F. (2d) 926 (C.C.A. 9, 1943); *Michigan Transit Corporation v. Brown, deputy commissioner,* 56 F. (2d) 200 (D. C. Mich. 1929); *Del Vecchio v. Bowers,* 296 U. S. 280 (1935); *Eastern Steamship Lines, Inc. v. Monahan, deputy*

commissioner, et al., 21 F. Supp. 535 (D. C. Me. 1937); *Grain Handling Co., Inc. v. McManigal, deputy commissioner,* 23 F. Supp. 748 (D. C. N. Y. 1938); *Simmons v. Marshall, deputy commissioner,* 94 F. (2d) 850 (C.C.A. 9, 1938); *Lowe, deputy commissioner v. Central R. Co. of New Jersey,* 113 F. (2d) 413 (C.C.A. 3, 1940); *Parker, deputy commissioner v. Motor Boat Sales, Inc.,* 314 U. S. 244 (1941).

The findings of fact of the deputy commissioner are presumed to be correct: *Anderson v. Hoage, deputy commissioner,* 63 App. D. C. 169, 70 F. (2d) 773 (1934); *Luckenbach Steamship Co. v. Norton, deputy commissioner,* 96 F. (2d) 764 (C.C.A. 3, 1938); *Burley Welding Works, Inc. v. Lawson, deputy commissioner,* 141 F. (2d) 964 (C.C.A. 5, 1944).

The rights, remedies and procedure under the Longshoremen's Act are governed exclusively by the statute, and the powers properly to be exercised by the Court are those only which are expressly conferred by the said Act: *Associated Indemnity Corp. v. Marshall, deputy commissioner,* 71 F. (2d) 235 (C.C.A. 9, 1934); *Shugard v. Hoage, deputy commissioner,* 67 App. D. C. 52, 89 F. (2d) 796 (1937); *Luyk v. Hertel,* 242 Mich. 445, 219 N. W. 721 (1928); *Texas Indemnity Ins. Co. v. Pemberton,* 9 S. W. (2d) 65 (Tex. 1928); *Nierman v. Industrial Comm.,* 161 N. E. 115, 329 Ill. 623 (1928); *Town of Albion v. Industrial Commission,* 202 Wis. 15, 231 N. W. 249 (1930). Compare also: *Bassett, deputy commissioner v. Massman Construction Company,* 120 F. (2d) 230 (C.C.A. 8, 1941), cert. denied 62 S. Ct. 92.

An "accidental injury" includes an injury which is unexpected and not designed, and just as much includes injury sustained by an employee subject to physical infirmities as injury to one who is strong and robust; such injury may occur notwithstanding the injured employee is then performing his usual and ordinary work: *Commercial Casualty Insurance Co., et al. v. Hoage, deputy commissioner, et al.,* 64 App. D. C. 158, 75 F. (2d) 677, certiorari denied 295 U. S. 733; *Hoage, et al. v. Employers' Liability Assurance Corp., Ltd.,* 62 App. D. C. 77, 64 F. (2d) 715, certiorari denied 290 U. S. 637; *Hoage, deputy commissioner, et al. v. Royal Indemnity Company, et al.,* 67 App. D. C. 142, 90 F. (2d) 387, certiorari denied 302 U. S. 736.

Even if the evidence permits conflicting inferences, the inference drawn by the deputy commissioner is not subject to review and will not be reweighed: *South Chicago Coal & Dock Co., et al. v. Bassett, deputy commissioner,* 309 U. S. 251 (1940); *Parker, deputy commissioner v. Motor Boat Sales, Inc.,* 314 U. S. 244 (1941); *Liberty Mutual Insurance Co. v. Gray, deputy commissioner,* 137 F. (2d) 926 (C.C.A. 9, 1943); *Lowe, deputy commissioner, et al. v. Central R. Co. of New Jersey,* 113 F. (2d) 413 (C.C.A. 3, 1940); *Henderson, deputy commissioner v. Pate Stevedoring Co., Inc.,* 134 F. (2d) 440 (C.C.A. 5, 1943).

(b) The Material Finding of Fact Is Supported by Evidence.

The following is a reference to so much of the testimony taken at the hearing before the deputy com-

missioner as is considered sufficient to show that the complained of finding of fact of the deputy commissioner is supported by evidence. This reference is not intended to cover all the testimony, as under the authorities it is necessary only to show that there is evidence to support the findings of fact of the deputy commissioner.

William Donoho, claimant, whose testimony was taken at Olive View Sanitarium, testified in part as follows: That he was in the employ of Contractors, Pacific Naval Air Bases, at the island base from March, 1942 to September, 1942; that he first worked as a male nurse at the first aid station (R. 30), and then drove a truck for hauling dirt; that he never had tuberculosis before to his knowledge, and that he first began to feel ill about two or three months after his arrival; that he felt fatigue, constant fatigue; that his condition was first diagnosed as tuberculosis upon his examination by the draft board, February 2, 1943 (R. 31); that he arrived back in the States in September, 1942; that he did not do any work between the time he arrived back in the States and the time when his condition was diagnosed as tuberculosis, because of the fatigue which he felt; that he does not believe he would have been able to do a day's work in that period; that he had been examined by the Navy before he left for work on the island and they found him free of tuberculosis; that the Navy's examination included a fluoroscope examination (R. 32, 33, 46); that the weather conditions on the island were very bad in the rainy season; that it rained four or five times a

day and when he was driving the truck, the equipment was such that he got soaked every time it rained; that after his job of driving a truck, he worked as steward and that he worked twelve hours a day and sometimes sixteen to eighteen hours a day; that his work as steward included going over to the hospital once a day to a patient who was isolated with the measles to see if he wanted anything; that he worked over 12 hours a day for four months, towards the end, and it was then he began to feel more fatigued (R. 34, 35); that the temperature was from 90 to 100 degrees with very high humidity; that the natives on the island worked in the mess hall handling the food; that tuberculosis among the natives might be common and some of them were taken ill; that one of the other employees, Bob Breman, working with them, is now in a tuberculosis hospital with a condition diagnozed as tuberculosis; that he, claimant, came in contact with him going over on the boat, and that Breman drove a truck the same as the claimant, and that he also came in contact with him in the mess hall and on casual visits (R. 36, 37); that there was still another employee, whose condition claimant understood was diagnosed as tuberculosis, by the name of Forbes; that claimant came in contact with him in his cabin and also in the mess hall; that claimant heard that several others broke down (R. 38); that the rainy season lasted approximately from April to August on the island (R. 39); that the truck which he drove had a cab but no doors (R. 41); that none of his family that he knows of has had tuberculosis. (R. 46.)

Dr. James B. Ford, Jr., testified in part as follows: That he is a physician and surgeon licensed in California, a graduate of Duke University, and is resident physician at the Olive View Sanitarium; that claimant's diagnosis is far advanced pulmonary tuberculosis (R. 47); that the condition could definitely have developed since March, 1942, and that fatigue is a very common symptom of tuberculosis; that the x-ray showed that claimant had a mixed type, showing some active and some healed tuberculosis together; that he is unable to state whether it is a condition of primary tuberculosis starting about the summer of 1942, or whether it is a reactivation or acceleration of an earlier condition; that with exposure to disease, long working hours and in bad weather would tend to lower the general physical condition of a patient and would have influence upon the development of the disease; that it is possible to contract tuberculosis through casual contact with individuals (R. 48, 49); that in view of the whole history, it is more likely that the disease started at the time his fatigue started (R. 51); that it is quite possible for the disease to develop as far as it has in the claimant in a period of six months (R. 52); that when a patient has tuberculosis any type of endeavor is contraindicated (R. 53); that tuberculosis seems to be of a more virulent type in the tropics; that it is possible for the tuberculosis bacillus to be transferred from person to plate and from plate to another person in the mess hall; that the disease can be transferred from a diseased person to a well person without actual contact between the two. (R. 54, 55).

(c) Finality of the Determination of Fact.

It will be seen from the above testimony that the finding of fact of the deputy commissioner in the compensation order complained of to the effect that claimant's disability was causally related to his employment is supported by the evidence, and thus supported is final and conclusive: *South Chicago Coal & Dock Co., et al. v. Bassett, deputy commissioner,* 309 U. S. 251 (1940); *Del Vecchio v. Bowers,* 296 U. S. 280 (1935); *Voehl v. Indemnity Insurance Co. of North America,* 288 U. S. 162 (1933); *Crowell, deputy commissioner v. Benson,* 285 U. S. 22 (1932); *Jules C. L'Hote, et al. v. Crowell, deputy commissioner,* 286 U. S. 528 (1932), 71 C. J. 1297, sec. 1268; *Parker, deputy commissioner v. Motor Boat Sales, Inc.,* 314 U. S. 244 (1941); *Marshall, deputy commissioner v. Pletz,* 317 U. S. 383 (1943).

The deputy commissioner is not bound to accept the opinion or theory of any particular medical examiner. He may rely upon his own observation and judgment in conjunction with the evidence: *Liberty Stevedoring Co., Inc. v. Cardillo, deputy commissioner,* 18 F. Supp. 729 (D.C. N.Y. 1937); *Joyce v. United States Deputy Commissioner,* 33 F. (2d) 218 (D. C. Me. 1929); *Jarka Corporation of Philadelphia v. Norton, deputy commissioner,* 56 F. (2d) 287 (D.C. Penn. 1930); *E. S. Booth v. Monahan, deputy commissioner,* 56 F. (2d) 168 (D. C. Me. 1930); *Zurich General Accident & Liability Insurance Co. v. Marshall, deputy commissioner,* 42 F. (2d) 1010 (D.C. Wash. 1930); *Baltimore & Ohio R. R. Co. v. Clark, deputy com-*

missioner, 56 F. (2d) 212 (D.C. Md. 1932); *Ryan Stevedoring Co., Inc., et al. v. Norton, deputy commissioner, et al.,* 50 F. Supp. 221 (D.C. E.D. Pa. 1943); *Liberty Mutual Ins. Co. v. Marshall, deputy commissioner,* 57 F. Supp. 177 (D.C. W.D. Wash N.D. 1944).

Evidence of casual relationship need not be positive and unequivocal to support an award of compensation. *Travelers Insurance Company v. Norton, deputy commissioner,* 43 F. Supp. 531 (D.C. E.D. Pa. 1942).

Where a deputy commissioner has determined a disputed question of fact the reviewing court will not substitute its judgment for that of the deputy commissioner nor reweigh the evidence: *Lumber Mutual Casualty Insurance Company v. Locke, deputy commissioner,* 60 F. (2d) 35 (C.C.A. 2, 1932); *Steamship Terminal Operating Corp. v. Schwartz, deputy commissioner,* 140 F. (2d) 7 (C.C.A. 2, 1944); *Groom v. Cardillo, deputy commissioner,* 119 F. (2d) 697 (App. D.C. 1941); *Henderson, deputy commissioner v. Jones,* 110 F. (2d) 952 (C.C.A. 5, 1940); *Fidelity and Casualty Company v. Henderson, deputy commissioner,* 128 F. (2d) 1019 (C.C.A. 5, 1942); *Southern Steamship Co. v. Norton, deputy commissioner,* 101 F. (2d) 825 (C.C.A. 3, 1939); *Luckenbach Gulf Steamship Co. v. Henderson, deputy commissioner,* 133 F. (2d) 305 (C.C.A. 5, 1943); *Henderson, deputy commissioner v. Pate Stevedoring Co.,* 134 F. (2d) 440 (C.C.A. 5, 1943); *Marshall, deputy commissioner v. Pletz,* 317 U. S. 383 (1943); *Norton, deputy commissioner v. Warner,* 321 U. S. 565 (1944).

(d) Claimant Sustained "Injury" Within Meaning of Act.

The term "injury" is defined in section 2 (2) of the Longshoremen's Act (33 U.S.C.A. sec. 902 (2)) as follows:

> "The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment."

The Longshoremen's Act is one of the most liberal compensation laws in the United States in respect to the definition of the term "injury". It is more liberal in this respect that the New York workmen's compensation law (prior to its amendment) upon which the Longshoremen's Act was largely modeled, in that the term "injury" in the Longshoremen's Act includes "such occupational disease or infection as arises naturally out of such employment". *Todd Dry Docks, Inc., et al. v. Marshall, deputy commissioner, et al.,* 61 F. (2d) 671 (C.C.A. 9, 1932). In the present case the deputy commissioner found in effect that the conditions which claimant encountered in the course of his employment caused or reactivated the condition of tuberculosis. Diseases, whether from a fresh infection or the awakening of an old one, resulting from conditions of employment are considered injuries within the meaning of the law. *Lea Mathew Shipping Corporation, et al. v. United States Employees' Compensation Commission, et al.,* 56 F. (2d) 860 (D.C.

W.D. Wash. 1930) (bronchiestasis); *Hoage, deputy commissioner, et al. Employers' Liability Assurance Corporation, Ltd.,* 64 F. (2d) 715 (App. D.C. 1933), cert. den. 54 S. Ct. 54; *Hoage, deputy commissioner, et al. v. Royal Indemnity Co., et al.,* 90 F. (2d) 387 (App. D.C. 1937); *Bishop v. Comer and Pollock, Inc.,* 297 N.Y.S. 946, 251 App. Div. 492 (1937) (tuberculosis); *Tweten v. North Dakota Workmen's Compensation Bureau,* 69 N. D. 369, 287 N. W. 304 (1939) (pneumonia); *Andreason v. Utah Industrial Commission,* 98 Utah 551, 100 P. (2d) 202 (1940) (bacillus enteriditis); *DeStefano v. Alpha Lunch Co.,* 308 Mass. 38, 30 N. E. (2d) 827 (1941) (trichinosis); *Union Mining Co. v. Blank* (not reported in State reports), 28 A. (2d) 568 (Md. 1943) (typhoid fever); *Arquin v. Industrial Commission,* 349 Ill. 220, 181 N. E. 613 (1932) (epidemic meningitis). Even the California State Courts have at times recognized that the term "injury" may include disease. In the case of *Casserly v. City of Oakland,* 215 Cal. 600, 12 P. (2d) 425 (1932), the Court said:

> "The words 'injury' and 'killed', as used in the charter, and similar provisions which provide for compensation in cases of this character are not limited in their interpretation to injuries caused by external violence, physical force, or as a result of accident in the sense that the words are commonly used and understood, but they are given a much broader and liberal meaning. So construed, they include any injury or disease arising out of and in the course of employment, which causes incapacity or death. The word 'injury' has reference not to some break in some

> part of the body or some wound thereon, or the like, but rather to consequences or disability that result therefrom. Courts are practically unanimous in holding that the words should be given a broad and liberal construction in order that the humane purpose of the enactment may be realized. Such legislation should be applied fairly and broadly, with a view to confer the benefits intended."

In the case of *Grain Handling Co., Inc., et al. v. McManigal, et al.*, 23 F. Supp. 748 (D.C. W.D. N.Y. 1938) aff'd. 102 F. (2d) 464, cert. den. 308 U. S. 570, which arose under the Longshoremen's Act (the same Act involved in the instant case), the employee sustained an aggravation of a preexisting condition of tuberculosis from the inhalation of grain dust. From an award of compensation made to the claimant, the employer appealed to the United States District Court and from the decision of that Court affirming the award, to the United States Court of Appeals for the second circuit. The court stated:

> "The undisputed evidence is that claimant is suffering from pulmonary tuberculosis. The claimant testified to physical conditions commencing in June, 1934, which are symptoms of active tuberculosis. Three physicians, both from physical examinations and X-rays, testified to conditions showing a probable dormant pulmonary tuberculosis of long standing. * * *
>
> "The law is well settled that the word 'injury' as used in the statute includes any aggravation or activation of a previous condition, providing it can be said that such aggravation naturally arose

out of the employment. Lea Mathew Shipping Corp. v. U. S. Employees' Compensation Commission, D. C., 56 F. 2d 860; Hoage, Comm'r v. Employers' Liability Assur. Corp., 62 App. D. C. 77, 64 F. 2d 715; Southern Shipping Co. v. Lawson, D. C., 5 F. Supp. 321.

* * * * * * *

"Attention has been called to several cases in the federal courts in which awards made for disabilities from diseases which did not naturally arise out of the occupation but arose during the employment were sustained. Types of these are: Todd Dry Docks, Inc. v. Marshall, 9 Cir., 61 F. 2d 671, in which an employee on shipboard contracted meningitis from passengers on board; Hoage v. Royal Indemnity Co., 67 App. D. C. 142, 90 F. 2d 387, 391, in which an employee suffered angina pectora caused by overwork; Hoage v. Employers' Liability Assur. Corp., 62 App. D. C. 77, 64 F. 2d 715, in which amputation of leg was made necessary as a result of exposure to intense cold; Commercial Casualty Ins. Co. v. Hoage, 64 App. D. C. 158, 75 F. 2d 677, in which disability arose from heavy work; Southern Shipping Co. v. Lawson, D. C., 5 F. Supp. 321, where disability resulted from a rupture; and Baltimore & O. R. Co. v. Clark, Com'r, 4 Cir., 59 F. 2d 595, 599, where there was disability from heat prostration. Some of these awards were clearly allowable on the theory of 'accidental injury.' Todd Dry Docks, Inc. v. Marshall, supra, is a broad interpretation of the statute. It was there held that infections need not be 'occupational' provided 'disability' arose naturally out of the employment."

In the case of *Lockheed Overseas Corporation, et al. v. Pillsbury, deputy commissioner, and Robert B. Strand,* 52 F. Supp. 997 (D.C. S.D. Cal. 1943), it was held that an employee who became disabled by the development of active tuberculosis, caused or exacerbated into activity by the condition of his employment, was entitled to compensation under the so-called Defense Bases Act,—the same Act as was applied in the present case.

Appellants' contention, in substance, that disability resulting from an infection, such as tuberculosis, is not compensable under the Longshoremen's Act unless the infection is peculiar to the particular occupation, is not supported by the authorities cited in the above opinion, particularly the case of *Todd Dry Docks, Inc. et al. v. Marshall, deputy commissioner, et al.,* 61 F. (2d) 671, decided by this Honorable Court on November 7, 1932. In that case the employee died from spinal meningitis which the deputy commissioner found had been contracted while the employee was working on board a vessel where there were several cases of that disease. With reference to the contention of the employer and carrier, this Honorable Court stated:

> "Their contention is that the infection must be an *occupational one;* that is, that the phrase of the section (33 USCA sec. 902, subd. (2) dealing with disease should be construed as though it read, 'and such occupational diseases or [occupational] infection as arise naturally out of such employment.' We see no reason for thus limiting the plain language of the act, nor is it at all clear

that the suggested addition of the qualifying word 'occupational' to the word 'infection' would affect the result. Appellants state, 'No one contends that cerebrospinal meningitis is an occupational disease.' This, however, does not meet the situation at all. It is a fundamental canon of construction that all the words of a statute should be given some significance, and to hold that 'occupational disease' and 'infection' or 'occupational infection' are synonymous would in effect strike out of the statute the words 'or infection.' It would seem clear that the injury which resulted in the death of the employee was either an 'accidental' injury as defined by the act, or an infection arising naturally out of the employment.

"The Appellate Court of Indiana, in dealing with the subject of disease as an injury by accident within the meaning of that phrase as used in the Workmen's Compensation Laws, in the case of United Paperboard Co. v. Lewis, 65 Ind. App. 356, 117 N. E. 276, 277, said:

" 'The courts have also differed as to whether a disease following an employment should be considered an injury by accident within the meaning of such acts. In the various decisions on this subject it is generally recognized that diseases are of two classes: First, the so-called industrial or occupational diseases, which are the natural and reasonably to be expected results of a workman following a certain occupation for a considerable period of time; second, diseases which are the result of some unusual condition of the employment. The first class is illustrated by lead poisoning and the second by pneumonia following an enforced exposure. As a rule such industrial

or occupational diseases are not considered as injuries by accident and in the absence of special statutory provision compensation is not allowed therefor. On the other hand, it is generally accepted that a disease, which is not the ordinary result of an employee's work, reasonably to be anticipated as a result of pursuing the same, but contracted as a direct result of unusual circumstances connected therewith, is to be considered an injury by accident, and comes within the provisions of acts providing for compensation for personal injury so caused.'

"If we accept the definitions thus suggested by the Appellate Court of Indiana, it follows that, if the 'infection' was a result naturally and reasonably to be expected from the decedent's occupation, it was not compensable as an accidental injury, but it would follow also that it was an 'occupational infection'. On the other hand, if we assume it was not reasonably and naturally to be expected, the disease, thus resulting from 'unusual circumstances', would be an 'accidental' injury within the meaning of that term as defined by the Appellate Court of Indiana in the excerpt above quoted. We do not, however, wish to be understood as implying our acceptance of appellants' contention that the statute limits compensable infection to 'occupational infection', except to the extent that such limitation is contained in the qualifying words of the statute, 'infection as arises naturally out of such employment'. *We are satisfied that the death of the employee in the case at bar resulted from an infection arising naturally out of such employment, and that Congress employed the phrase under discussion to set*

at rest the question which had been considered by the courts as to whether or not such an infection was the result of an accident or was an accidental injury compensable under the workmen's compensation laws. Arquin v. Industrial Comm., 349 Ill. 220, 181 N. E. 613, decided June 24, 1932, where a hospital interne contracted meningitis. See, also, our decision in Sullivan Mining Co. v. Aschenbach, 33 F. (2d) 1, applying the Workmen's Compensation Law of Idaho to a case of a painter poisoned by carbon disulphide fumes from a paint thinner. See, also, Industrial Comm. v. Roth, 98 Ohio St. 34, 120 N. E. 172, 6 A. L. R. 1463, to the same effect as to fumes arising from respects under consideration differs from the New York Compensation Law (Consol. Laws, c. 67), from which, in the main, our Longshoremen's and Harbor Workers' Act is taken." (Emphasis supplied.)

"The question is not concluded by the decisions of the New York courts, because the statute in the hot paint.

Compare *Aetna Life Insurance Company v. Portland Gas & Coke Co.,* 229 F. 552, 553, L.R.A. 1916D, 1027, where this Honorable Court held that the contracting of typhoid fever from drinking water furnished by the employer was a bodily injury accidentally suffered. Compare also *Dansky v. Cardillo, deputy Commissioner,* 40 F. Supp. 336 (D.C. 1941), involving a claim for tuberculosis under the Longshoremen's Act as applied to employment in the District of Columbia. See, also, the following cases in which tuberculosis resulting from the conditions of employment was con-

sidered a compensable injury: *Yearich v. Roosevelt Hospital, et al.,* 37 N.Y.S. (2d) 149 (1942); *Dixie Ice Cream Co. v. Ingels, et al.,* 291 Ky. 39, 163 S. W. (2d) 20 (1942); *Milwaukee County v. Industrial Commission,* 272 N. W. 46 (Wisc. 1937).

Appellants refer to Campbell, Workmen's Compensation, Volume I, paragraph 350, in support of their contention that the infection must be peculiar to the occupation engaged in by the employee to be compensable. The conditions referred to at that place obviously are *occupational diseases* (not infections), such as lead poisoning, silicosis, glass blower's arm; occupational neuritis, etc. Campbell apparently recognizes the distinction for he earlier (par. 331, et seq.) devotes considerable space to so-called "infectious diseases", and in connection with them he does not state that an infectious disease must be peculiar to the particular occupation, and he cites the *Todd Dry Docks* case, *supra,* as authority that disability resulting from an infectious disease constitutes a compensable injury.

Appellants cite several decisions in the California State courts construing the California workmen's compensation law, which are stated as supporting their contention "that there must be a special exposure to the disease. In other words, the incidence of the disease must be greater among men engaged in the particular occupation than among the people in general in the commonalty in which the labor is performed."

It is submitted, first, that the definition of "injury" in the Longshoremen's Act is not the same as in the California statute; the definition of "injury" in the compensation law of California does not include "infections" as the Longshoremen's Act does; second, even though the provisions of the two statutes were similar, the decisions of the State jurisdiction under the State Act would not be controlling upon the Federal courts in the construction of the Federal statute; third, insofar as the decisions construing the California law hold that a risk resulting in injury to be compensable must constitute a special exposure, that is, one which is greater than that to which the general public is exposed, they are contrary to the weight of authority. This is the old "commonalty doctrine."

In the early administration of compensation laws some of the states adopted what was then referred to as the "commonalty doctrine." Under such doctrine it was deemed necessary to show that the employee was subject to a greater risk or hazard than that to which the public in general was subjected. This doctrine led to so many injustices that it has been repudiated wherever critical judicial inquiry into all of its aspects has been made. Such doctrine has *not* been adopted in decisions arising under the Longshoremen's Act. The doctrine was specifically rejected by the United States Circuit Court of Appeals for the fourth circuit in the leading case of *Baltimore and Ohio R. R. Co. v. Clarke, deputy commissioner,* 59 F. (2d) 595, and under the same Act which is before this Court. In that case the Court said:

> "And we think it equally clear that heat prostration resulting from the conditions of employment, as was found by the deputy commissioner in this case, is compensable under the statute without reference to whether there was any unusual or extraordinary condition in the employment not naturally and ordinarily incident thereto. The statute provides that 'the term "injury" means accidental injury or death arising out of and in the course of employment.' 33 USCA sec. 902. *It says nothing about unusual or extraordinary conditions; and there is no reasonable basis for reading such words into the statute.* A workman who sustains heat prostration as the result of the working conditions under which he labors, has sustained an injury 'arising out of and in the course of his employment'; and the fact that other workmen may not have been affected or that he may have been rendered more readily susceptible to injury than they were by reason of his physical condition cannot affect the matter." (Emphasis supplied.)

Such doctrine was also specifically rejected by the United States Court of Appeals for the District of Columbia in *New Amsterdam Casualty Co. v. Hoage, deputy commissioner,* 62 F. (2d) 468, which arose under the Longshoremen's Act as applied in the District of Columbia,—the same Act as is before this Court. The Court in that case said that:

> "In the early administration of compensation laws, the rule was often adopted that injuries occurring upon the public highways due to traffic hazards did not 'arise out of' the workmen's

> employment. This rule was founded upon the theory that such hazards are common to the community at large and are not incident to particular employments, and it was held that the compensation acts were not designed to exempt the employee from such risk. *This doctrine, however, has since been abandoned.*" (Emphasis supplied.)

In the case of *Aetna Life Insurance Co. v. Hoage, deputy commissioner,* 63 F. (2d) 818, the appellant attempted to invoke the old "commonalty doctrine" in heat stroke cases, arguing that the employee in that case was not subject to any greater heat than was common to the community in general. In the *Aetna Life Insurance Company* case the court definitely reaffirmed the position previously taken in the *New Amsterdam Casualty Company* case, *supra,* by holding that:

> "Although the risk may be common to all who are exposed to the sun's rays on a hot day, the question is *whether the employment exposes the employee to the risk.*" (Emphasis supplied.)
>
> Cf. *Hartford Accident & Indemnity Co. v. Cardillo, deputy commissioner,* 112 F. (2d) 11 (1940) cert. den. 310 U. S. 649.

In *Matter of Katz v. Kadans & Co.,* 232 N.Y. 420, 134 N. E. 330, the court said:

> "But the fact that the risk is one to which every one on the street is exposed, does not itself defeat compensation. Members of the public may face the same risk every day. *The question is whether the employment exposed the workmen*

to the risks by sending him onto the street, common though such risks were to all on the street." (Emphasis supplied.)

Cf. *Lepow v. Lepow Knitting Mills,* 288 N. Y. 377, 43 N. E. (2d) 450 (1942); *Stilwell v. Aberdeen-Springfield Canal Co.,* 61 Ida. 357, 102 P. (2d) 296 (1940); *Burroughs Adding Machine Co. v. Dehn,* 110 Ind. App. 493, 39 N. E. (2d) 499 (1942).

In *Burroughs Adding Machine Co. v. Dehn, supra,* 110 Ind. App. 483, 39 N. E. (2d) 499, the court said:

"Many of the limitations upon the granting of compensation under the Act are judicial inventions wholly unjustified by the language of the Act or the humane purposes of the legislation in enacting it. There is nothing in the language of the Act that requires an employee's injury by accident to arise out of the *nature* of the employment, nor is there anything in the language of the Act that requires the risk to which the employee is subjected to be different from the risk to which the general public in the community is subjected. These limitations to the granting of compensation are but judicial accretions to the language of the Act."

Appellants have devoted four pages of their brief to quote from the case of *Hartford Accident & Indemnity Company v. Industrial Accident Commission,* 140 Cal. App. 432, 35 P. (2d) 366. In view of the importance which they apparently attach to this decision we believe it advisable to comment upon it more

particularly. In addition to the unappropriateness of decisions under the California workmen's compensation law due to the fact that said law does not cover "infections" as does the Longshoremen's Act, there are several material differences between that case and the instant case, as a reference to the part quoted by appellants will show. In that case the employee based his claim for compensation for tuberculosis upon exposure during eight hours of daily work as shipping clerk to extremes of heat and cold, smoke, ammonia gas and inclement weather. The remainder of the day, 16 hours, he spent away from the place of employment. He offered no proof of possible contact with the germ upon the job. He offered no medical evidence of casual relationship between his employment and the condition; on the other hand, two physicians for the employer and carrier testified that in their opinion there was no such relationship. Under these circumstances, the Court, after reciting the above facts, stated:

> "* * * whenever the subject under consideration is one within the knowledge of experts, only, and is not within the common knowledge of laymen, the expert evidence is conclusive upon the question in issue. It follows that in such cases neither the Court nor the jury can disregard such evidence of experts, but on the other hand they are bound by such evidence even if it is contradicted by nonexpert witnesses. * * * Testimony of probative value sufficient to support applicant's claim is entirely lacking. No expert witness has expressed an opinion that it is even

> reasonably probable that the condition of applicant was due to his employment, and an award may not be predicated upon a possibility which is 'merely surmise and conjecture.' "

In the instant case, the evidence showed that the employee worked 16 to 18 hours a day and there was also evidence of likely sources of infection, in fellow employees with whom he came in contact and with the natives. Where an employee is sent by his employer to foreign lands, and particularly where, as here, the employer practically was in control of the employee's entire day, and provided the barracks in which the employee lived and slept, he is not required to show that he came in contact with the germ which produced the disease, during *actual working hours. Lepow v. Lepow Knitting Mills, supra,* 288 N. Y. 377, 43 N. E. (2d) 450 (1942). Cf. *Arquin v. Industrial Commission, supra,* 349 Ill. 220, 181 N. E. 613 (1932.) Even the California State courts concede that, where an employee is sent by his employer to foreign lands and there contracts a contagious or infectious disease, which is prevalent, he is not required to show that the germ entered his system during working hours. See *Fidelity & Casualty Co. of New York v. Industrial Accident Commission of California,* 84 Cal. App. 506, 258 P. 698 (1927.) Assuming *arguendo,* that the conditions of claimant's employment had been such that at the end of his day's work, claimant had gone to his own home and not to a barracks provided by his employer as part of the employment agreement and had contracted a disease under such

circumstances, it would not have been necessary for him to prove with absolute certainty that he contracted the disease during working hours. A higher or greater degree of proof is not nor should be required in compensation cases. In the case of *City and County of San Francisco v. Industrial Accident Commission,* 183 Cal. 273, 191 P. 26, where a hospital steward contracted influenza during the epidemic of 1918 and it was not proven with certainty whether he contracted it at the hospital where he was employed or at his home or elsewhere, the Court after calling attention to evidence from which it could be found that it was more probable that he contracted the disease at the hospital said:

> "It, of course, cannot be said that from these facts it is certain that Slattery contracted his sickness because of his employment. *But certainty is not required.* It is not even required that the award be, in our judgment in accord with the preponderance of the evidence, in order that we be not at liberty to annul it. We cannot disturb the award unless we can say that a reasonable man could not reach the conclusion which the Commission did. This we cannot say in the present case."

This quotation was repeated and approved in *Pacific Employers Insurance Company v. Industrial Accident Commission,* 19 Cal. (2d) 622, 122 P. (2d) 570. Compare *DeStefano v. Alpha Lunch Company of Boston, supra,* 308 Mass. 38, 30 N. E. 827 (1941) where the employee contracted trichinosis from meals eaten

outside of working hours, but as part of the employment agreement and therefore incidental to the employment. The Act does not provide for compensation for injuries which arise out of and in the course of the "work" but which arise out of and in the course of the "employment." Though the claimant ceased work at the end of each day, he did not terminate his employment. *Lamm v. Silver Falls Lumber Co.,* (not reported in State reports), 286 P. 527 (Or. 1930.) His contact with the natives, both in connection with the work and otherwise, his daily trips to the hospital in connection with his work as steward, his contact with his fellow employees on the boat en route to the Samoan Island and after arrival, both at work and in the barracks, were all risks which he encountered *because* of his employment, not merely *during* the employment. *Hartford Accident and Indemnity Co. v. Cardillo, deputy commissioner,* 112 F. (2d) 11, 14 (App. D. C. 1940.) The "bunk house" rule is as applicable in this case as in case of injury on the premises.

Appellants state, in effect, that exhaustion and overwork were not peculiar to claimant's employment; that they are incidents of all occupations in which physical work or long hours or both are demanded of the employees, and presumably, that any disability resulting from such exhaustion or overwork is not compensable. No authorities are cited by appellants in support of their statement. There is, however, authority *decidedly to the contrary* and under the

same Act which was applied in the present case: see *Hoage, deputy Commissioner v. Royal Indemnity Company,* 90 F. (2d) 387 (App. D. C. 1937.)

II.

AN ALTERNATIVE EVIDENTIARY FINDING, EITHER ALTERNATIVE OF WHICH WILL SUPPORT AN ULTIMATE FINDING, IS PROPER.

Appellants contend that because the deputy commissioner found that claimant either contracted a new infection or reactivated an old one, the finding was objectionable and for that reason the case should be remanded to the deputy commissioner to make an election between the alternatives. Where either alternative would support an award it is not necessary to make an election, and the finding may be stated in the alternative. *Zionek v. Glen Alden Coal Co.,* 105 Pa. Super. 189, 160 A. 154 (1932); *California Shipbuilding Corporation v. Industrial Accident Commission,* (not reported in State reports), 149 P. (2d) 432 (Cal. 1944.) It is only where one of the alternative findings would not support an award, that such alternative finding is insufficient. Of such character was the case of *Greenberg v. Greenberg,* 193 App. Div. 574, cited by appellants.

In the instant case, either finding would support the award and therefore an election is not required.

CONCLUSION.

In the concluding paragraphs of appellants' brief sympathy is expressed for claimant in his "unfortunate condition." It is believed that the more modern conception of duty to an employee who becomes disabled in and by reason of his employment is to go beyond a mere expression of sympathy. He should be taken care of until his disability is terminated and he is able to return to employment, and that is what the Act was intended to accomplish.

The deputy commissioner has found from the evidence that claimant's disability is causally related to his employment. It is respectfully submitted that the order and judgment of the court below dismissing the complaint was proper and should be affirmed.

Dated, San Francisco,
March 16, 1945.

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No. 10,950.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CONTRACTORS, PACIFIC NAVAL AIR BASES and LIBERTY MUTUAL INSURANCE COMPANY (a corporation),

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, United States Employees' Compensation Commission for the Thirteenth Compensation District, and William Donoho,

Appellees.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

I.

Reply to Appellee's Point I.

(a) GENERAL PRINCIPLES.

Nothing is further from the minds of appellants than to dispute the statement of "General Principles" which the appellee sets out under Point I (a) of his argument. The principle that administrative action is presumed to be correct and that administrative findings of fact will not be disturbed if they are supported by evidence is too well entrenched to be made the basis of this appeal. The claim advanced simply is that in spite of the presump-

tions that are applied by reviewing courts in connection with appeals from administrative action, *the necessary minimum of evidence has not been adduced in this case.*

Appellee will concede as readily as we are willing to concede his statement of general principles that findings of fact which are not supported by evidence or awards which are not supported by the findings of fact must be set aside in the event of a review.

(b) The Material Findings of Fact.

We, of course, admit that the applicant suffers from tuberculosis; we admit the description of the conditions under which the applicant had to work, and we also concede that they were strenuous and trying. But are these facts sufficient evidence that the employment of the applicant was *the cause* of his disability and that the disease or infection arose "naturally out of such employment"?

The applicant's testimony with respect to possible exposure to, or contact with, tuberculosis is based entirely on surmise. Could it be said that the fact that one of applicant's co-employees is "now" (at the time of the hearing) in a tuberculosis hospital possibly be dignified with any other label than conjecture as far as the source of applicant's disability is concerned, even if that other employee came in contact with the applicant on the boat that transported both of them to Samoa, or even if the other individual drove a truck, and even though the other individual came in contact with the applicant in the mess hall or on casual visits?

Can it be said to be more than conjecture and surmise that "tuberculosis among the natives *might* be common"; or that there is another employee whose condition "claim-

ant understood was diagnosed as tuberculosis," even though applicant came in contact with him in the mess hall or in the cabin?

Is it more than conjecture or surmise to say that "claimant heard that several others broke down"?

A reference to page 8 of appellee's brief, in which we may safely assume he puts his best foot forward as far as the evidence is concerned, will not reveal any better or additional statements than those reproduced here. This is indeed a shaky premise for appellee's conclusion as to the origin of applicant's tuberculosis.

The same observation can be made with respect to the medical testimony found on page 9 of appellee's brief. It is even more vague than that of the applicant. It is indeed so vague that under subdivision (c) of Point I of his brief the Deputy Commissioner states that he does not feel himself bound by the opinion of any medical examiner and that he may form his own impression with respect to the medical evidence.

(c) Appellee's Power to Judge Medical Questions Is Not Arbitrary.

Now, it is, of course, true that a Commissioner who sees a disabled limb may form his own impression as to the degree of permanent impairment (such being the case in *Joyce v. U. S. Deputy Commissioner,* 33 Fed. (2d) 218 (D. C. Me., 1929)); or that the Deputy Commissioner may, where the fact of fracture is undisputed, decide that it was the fracture which produced the resultant disability of the applicant to perform useful work (as was the case in *Jarka Corp. v. Norton,* 56 Fed. (2d) 287 (D. C. Penn.,

1930)); or that he may choose between conflicting medical theories of disability (as was the case in *Kranski v. Atl. Coast Shipping*); or that he may determine that a man is totally disabled from following the duties of a longshoreman or any *like occupation,* although there was medical testimony to the effect that the applicant could pursue a vocation requiring not much lifting or walking (*Zurich General Accident & Liability Ins. Co. v. Marshall,* 42 Fed. (2d) 1010 (D. C. Wash., 1930)); but these examples just about exhaust the field in which the Deputy Commissioner can supplant, by his own impressions, the medical testimony offered. It is a far different claim which appellee makes here. He claims to have the right *in the absence of any competent medical testimony to say by looking at a man* HOW OR IN WHAT MANNER OR UNDER WHAT CIRCUMSTANCES AND CONDITIONS ACTIVE TUBERCULOSIS WAS CONTRACTED.

It is conceded that evidence of causal relationship need not be positive and unequivocal, but on the other hand, it must not rest on conjecture and speculation.

(d) WHAT IS MEANT BY "INJURY" UNDER THE ACT?

The claim is too readily made that since the statute has to be liberally construed, the Deputy Commissioner's action should be free from scrutiny. His liberality should be as broad as the purpose of the statute, but no broader. Neither sympathy nor unusual circumstances can justify a conversion of the act which requires that the disease or infection *arise naturally out of the employment* into a statute which says that whenever a man gets sick while he is on a job, he is entitled to an award under the Longshoremen's Compensation Act. It has been held, as ap-

pellee aptly points out, that the Longshoremen's Compensation Act includes "such occupational disease or infection as arises naturally out of such employment," but where is the evidence in this case on which the Deputy Commissioner could conclude that tuberculosis arises naturally out of driving a truck on the Island of Samoa, or working in a mess hall, or going once a week into an infirmary where measles are treated?

The examples which appellee cites under subheading (d) of his Point I do not support his claim and are readily seen to be different. Where it is an established fact that on a ship several cases of spinal meningitis had occurred and that the patients suffering from that disease were on the ship when the employee went on board, the causal connection between the employee's contracting spinal meningitis and the existence of the disease on the ship is easily seen and quite different from the surmises previously referred to from which the Deputy Commissioner is supposed to have derived a causal connection in the case at bar. It is likewise natural to expect that a man who is continually required to inhale copper ore dust may contract bronchiectosis; or that a man continually exposed to the cooling rooms of an ice cream factory might by reason thereof contract thrombo-angitis obliterans; or that a man who is compelled to over-exert himself over a long period of time might suffer a nervous breakdown. (These are samples of appellee's authorities.) But it does not follow that in the absence of medical evidence the Commissioner should have the power to find that a sojourn of less than a year on the Island of Samoa under tropical conditions is a natural circumstance from which tuberculosis results.

We have purposely analyzed only a few of the cases on pages 12 and 13 of appellee's brief. The rest of them will easily be seen to fall into the same pattern.

The case of *Grain Handling Co., Inc. v. McManigal* has already been discussed in our opening brief and its plain difference from the case at bar has been there pointed out.

On page 16, we are referred to the case of *Lockheed Overseas Corp. v. Pillsbury,* 52 F. Supp. 997 (D.C.S.P. D. Cal., 1943). The analogy between the case at bar and that case consists solely in the fact that the Defense Bases Act is involved in both, and that the illness involved in both is tuberculosis, but at that point the analogy ceases. To establish that very plainly we shall quote from the District Court's statement of facts in the *Lockheed* case, which is as follows:

> "* * * Defendant Strand on or about May 19, 1942, after a pre-employment X-ray examination by complainant Lockheed *which showed healed pulmonary pathology or quiescent pulmonary tuberculosis,* was employed by complainant Lockheed Overseas Corporation (hereinafter called Lockheed). Defendant Strand had been working continuously for Lockheed Corporation since January, 1941, as a gee man in tooling. He had passed his physical examination for entrance into the Navy just before his pre-employment X-ray examination by Lockheed. Strand was thereafter sent outside of the continental United States by Lockheed to work at a military base situated near Great Britain. While en route to said base he sustained a heavy cold aboard ship, which was caused and aggravated by crowded conditions aboard the vessel and the prevalence of respiratory infections

among the men rooming in such crowded quarters of the ship with Strand. Thereafter, in England, defendant Strand's cold became worse, due to changes in climate to which Strand was not accustomed, and inability of defendant's physicians at the base to make proper examination within reasonable time because of nonarrival of necessary equipment, and after arriving at a permanent military base where defendant worked digging ditches, carrying bags of cement in erecting pre-fabricated steel for houses; after about a week of this hard work he began to have pains about the chest and a feeling of fatigue. Subsequent examinations abroad by a physician employed by Strand revealed the presence of active pulmonary tuberculosis. This condition was subsequently confirmed by physical examinations of Strand upon his return to the United States, where he was returned by Lockheed upon his becoming disabled in Lockheed's employ overseas." (Italics ours.)

It would seem that no further discussion is required to distinguish the two cases.

Under the same subheading (d) of his brief, appellee contends that the California cases cited in support of appellant's position are not applicable because the Longshoremen's Act, so it is claimed, does not adhere to the "old" commonalty doctrine. It is to be inferred from the use of the adjective "old" that modern or progressive jurisprudence would require the abandonment thereof, in that it is not sufficiently liberal toward employees? Nobody would accuse the California Supreme Court of illiberality toward employees, and it would indeed be diffi-

cult to find a more liberal act toward employees than the California Labor Code. We gain the impression from reading appellee's discussion that the definition of the term "injury" in the Longshoremen's Act is one of extreme liberality and that in comparison the California definition is correspondingly restricted and practically tailored to fit the "old" commonalty doctrine. Quite the contrary is true, however. The Longshoremen's Act requires that "infection" (admitting, for argument only, that infection need not be occupational) must arise "naturally" out of the employment, whereas, the California definition in Labor Code 3208 reads as follows:

> " 'Injury' includes any injury or disease arising out of the employment, including injury to artificial members."

We see, the California law even drops the qualifying adjective "naturally." Neither the statute therefore nor the attitude of the Supreme Court of California can be said to be stingy or miserly toward employees.

But whether the Longshoremen's Act does or does not recognize the "old" commonalty doctrine, and whether or not the "infection" referred to in the Longshoremen's Act must be occupational or not, it is plain beyond peradventure that even under it the infection must arise "naturally out of such employment" or must result "naturally or unavoidably * * * from such accidental injury." It therefore is still the fact and we may insist that a natural and causal relationship between the employment and the infection has to be shown.

We are surprised at appellee's reference to the case of *Burroughs Adding Machine Co. v. Dehn,* 110 Ind. App. 483, 39 N. E. 499, which appears on page 24 of his brief. The quotation would indicate that the Indiana Act contains *no requirement* that the accident arise out of the nature of the employment, but the Longshoremen's Compensation Act, on the other hand, contains that very requirement as abundantly appears from the discussion herein.

Appellee concedes that it must be the employment which exposes the employee to the risk (for instance, the discussion on page 23 of his brief), but again he fails to point out where the applicant's employment exposed him to the risk of tuberculosis. An abortive attempt to do so is made on page 28 where it is said that the contact with the natives, his work as a steward, his contact with fellow employees on the boat, at work or in the barracks were risks which he encountered because of his employment. But where is there any evidence aside from the surmise and conjecture already referred to that his work on Samoa brought him into contact with tuberculosis, that his daily trips to the hospital brought him in contact with tuberculosis, that the fellow employees on the boat en route to Samoa had tuberculosis, or that people he encountered in his work or in the barracks had tuberculosis? Whichever way we read the transcript, commencing on page 34 and ending with page 46, or the summary thereof on page 8 of appellee's brief, the indispensable prerequisite that applicant's employment brought him in contact therewith is lacking.

II.

Reply to Point II.

Appellee says under this heading that findings in the alternative are proper if either alternative will support the conclusion of law and the award. We ask, however, what if either alternative, or even one of them, is not supported by the evidence? The only possible finding with respect to the applicant's condition before he left for Samoa on the basis of a fluoroscopic examination was that he was not infected with tuberculosis so that we have a situation quite different from that presented in *Lockheed Overseas Corp. v. Pillsbury,* 52 Fed. Supp. 997. If it is true that either finding supports the award, it is in the light of the foregoing discussion equally true that neither finding is supported by the evidence.

Conclusion.

It is, therefore, respectfully submitted that the award in favor of the applicant should be set aside.

Respectfully submitted,

CLAUDE F. WEINGAND,
Attorney for Appellants.

No. 10961

United States

Circuit Court of Appeals

For the Ninth Circuit.

THOMAS W. NEALON,

Appellant,

vs.

HARRY W. HILL, a Receiver of Intermountain Building & Loan Association, a Corporation,

Appellee.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 374

Upon Appeal from the District Court of the United States for the District of Arizona

FILED

APR 2 - 1945

PAUL P. O'BRIEN,
CLERK

Rotary Colorprint, 55 Eleventh Street, San Francisco

No. 10961

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
For the Federal District of Arizona

No. E-268-Phoenix

GUADALUPE R. GALLEGOS and FRANCESCA GALLEGOS, his wife; INGA G. GUDMUNDSEN; and MATA E. DEXTER, in their own behalf and in behalf of others similarly situated,

Plaintiffs,

vs.

INTERMOUNTAIN BUILDING & LOAN ASSOCIATION, a corporation,

Defendant.

PLAINTIFFS' AMENDED BILL OF COMPLAINT IN EQUITY, WITH PRAYER FOR RECEIVER

Come Now Guadalupe R. Gallegos and Francesca Gallegos, his wife, Inga G. Gudmundsen and Mata E. Dexter, by Elizabeth G. Monaghan, their solicitor, in their own behalf and in behalf of others similarly situated, leave of Court to amend having been heretofore obtained, and for cause of action against the defendant, Intermountain Building & Loan Association, a corporation, state:

I.

That the jurisdiction of this case is conferred upon this Honorable Court by reason of the diversity of the citizenship of the parties hereto.

That the plaintiffs, Guadalupe R. Gallegos and Francesca Gallegos, his wife, Inga G. Gudmundsen and Mata E. Dexter, and each of them, are citizens and residents of the State of Arizona, and all and each of them reside in the County of Yavapai, State of Arizona. [5]

That the defendant is a corporation organized and existing under and by virtue of the laws of the State of Utah, and is a citizen of the State of Utah, its principal place of business being fixed by its Articles of Incorporation at Salt Lake City, State of Utah, and the defendant is now, and has been at all times mentioned herein, doing business within the County of Maricopa, State of Arizona, and maintaining offices for the transaction of business in the City of Phoenix, State of Arizona, and owns property in Arizona.

II.

That each of the plaintiffs herein is a contract creditor of the defendant and each holds an express contract lien to secure the debt of said defendant corporation due to said plaintiff as hereinafter more fully appears.

III.

Plaintiffs further allege that the amount in controversy herein far exceeds, exclusive of interest and costs, the sum or value of $3,000.00, being to-wit, a sum in excess of $2,000,000.00, exclusive of interest and costs.

IV.

That the aggregate amount of the debts due to plaintiffs herein and the liens securing the debts

due them by said defendant corporation is in excess of $3,000.00, exclusive of interest and costs, to-wit, $6,715.50, exclusive of interest and costs. That the nature of the liens which secure the obligations due to each of these plaintiffs is hereinafter more fully described.

V.

That this bill of complaint is filed in equity for the reason that none of the plaintiffs herein has a full, adequate or complete remedy at law. [6]

VI.

That the plaintiffs bring this action on behalf of themselves and for all others similarly situated who desire to come in and bear their proportion of the expenses of this suit; that the persons so situated are too numerous to be made parties to this action.

VII.

That the amount of the debt due to plaintiffs, Guadalupe R. Gallegos and Francesca Gallegos, his wife, exclusive of interest and costs, is the sum of $1,155.00, and all of it, together with accumulated interest thereon, is secured by the lien hereinafter mentioned and hereinafter described.

That on, to-wit, the 23rd day of February, 1924, in the County of Yavapai, State of Arizona, plaintiffs, Guadalupe R. Gallegos and Francesca Gallegos, his wife, purchased an "Installment Savings Certificate" No. 10344 from the defendant upon monthly payments of $11.00 each, and paid thereon a total of $1,155.00, being equivalent to 105 pay-

ments of $11.00 each, and the defendant issued to them its "Installment Savings Certificate," dated February 26, 1924, for $2,000.00, payable at the expiration of 126 months from that date, and promised and agreed with the said plaintiffs that as security for the performance of its obligation thereunder that it would hold intact, subject to the constant examination and inspection of the Banking Department of the State of Utah, first mortgages on improved real estate in an amount equal to at least 100 per cent of its liability thereunder, less the amount of any loans made on it or like certificates or any certificates issued in lieu thereof, and said promise and agreement is incorporated in and made a part of said "Installment Savings Certificate" No. 10344.

That no loan is outstanding or existing upon said certificate nor on any like certificate to these plaintiffs, nor has [7] any certificate been issued in lieu of said certificate.

That said "Installment Savings Certificate" No. 10344 is in words and figures as follows:

"Incorporated under the Laws of the State of Utah.

Maturity Value	Certificate Number
$2000.00	10344

Intermountain Building & Loan Association

Number of Shares	Series Number
20	27

Sept. 1923

Installment Stock Certificate

This Is To Certify that Mr. & Mrs. Guada-

lupe R. Gallegos of Prescott, Arizona, is the record owner of the above numbered Installment Savings Stock Certificate issued by the Intermountain Building & Loan Association of Salt Lake City, Utah, of the value, when matured of $2000.00; that in consideration of the payment by the said Mr. & Mrs. Guadalupe R. Gallegos, his heirs or assigns to the Intermountain Building and Loan Association, at its office in Salt Lake City, Utah, of $11.00 Monthly, in advance, for ten and one half years from date hereof, the Intermountain Building & Loan Association promises to pay to the said Mr. and Mrs. Guadalupe R. Gallegos, or the then record owner thereof, at the expiration of said period, upon presentation and surrender of this certificate, properly endorsed, to the Intermountain Building & Loan Association, at its General Office in Salt Lake City, Utah, Two Thousand Dollars legal tender money of the United States of America.

This certificate is issued and accepted subject to the provisions of the Articles of Incorporation as amended and the By-laws of the Association and the privileges, terms and conditions printed on the back hereof, all of which [8] are made a part hereof as fully as if set forth on the face of this certificate.

In Witness Whereof, the Intermountain Building & Loan Association has caused this certificate to be executed in its corporate name and its corporate seal to be hereto affixed at

Salt Lake City, Utah, this 26th day of February, 1924.

INTERMOUNTAIN BUILDING
& LOAN ASSOCIATION.
By DANIEL ALEXANDER,
President.

Attest:

THORWALD L. LARSEN,
Secretary.

[Corporate Seal]

Privileges and Conditions

Security. As Security for the performance of the obligations of the Association hereunder, the Association will hold intact, subject to the constant examination and inspection of the banking department of the State of Utah, first mortgages on improved Real Estate in an amount equal to at least one hundred per cent of its liabilities hereunder, less the amount of any loans made on this and like certificates or any certificates issued in lieu thereof.

Payments. The payments hereon made be made monthly, quarterly, semi-annually or annually in advance.

Payments in excess of the yearly payments in advance, shall increase the cash withdrawal value in an amount equal to such payments and accumulated interest credited to such excess payment. Such excess payment may be applied to the installment payment when same shall become due. [9]

Loan Value. Upon depositing this certificate with the Association as collateral security, the Association will lend the registered owner hereof any amount up to ninety per cent (90 per cent) of the then withdrawal value of this certificate, in the way and manner provided in the articles of incorporation and the by-laws of the Association and subject thereto.

Suspension. Payments on this certificate may be suspended from month to month for a period not to exceed six successive months upon written request, provided such written request be filed with the Secretary of the Association at Salt Lake City, before the payment becomes due. The maturity of a certificate on which payments have been suspended, shall be extended for a period equal to the total period of suspension of payments.

Re-instatement. The holder hereof may reinstate this certificate, in the event of default, at any time within six months from the time of default by resuming payments on this certificate. Before the certificate can be reinstated, the holder hereof must forward it to the Secretary of the Association at Salt Lake City, who will reissue it as of a series as many months later than its present series, as the certificate has been in default, and the maturity of this certificate will thereby be extended for a period equal to the total time that default continued.

Neither dividends nor interest shall be credited or allowed upon any certificate during the period that payments on said certificate shall be suspended or while said certificate is in default.

It is agreed that unless otherwise ordered by the Board of Directors, not to exceed 50% of the money received by [10] the Association on stock payments in any one month shall be used to pay cash and death withdrawal values and for making loans on stock certificates, and it is agreed that loans on stock certificates may be made in the order of the filing of application.

Schedule of Payments and Withdrawal Value
Calculated on a $1,000.00 Certificate
Greater or less amounts in proper proportions

If paid annually in advance	$64.02
If paid semi-annually in advance	32.52
If paid quarterly	16.50
If paid monthly	5.50

Withdrawal Value

Months	Values	Months	Values
24	83.60	78	$ 457.09
30	116.92	84	514.06
36	151.53	90	572.65
42	188.19	96	634.97
48	223.32	102	700.72
54	263.97	108	770.02
60	306.45	114	843.20
66	355.52	120	920.40
72	404.04	126	1,000.00

Collateral Assignment

For Value Received

hereby transfer and assign to the Intermountain Building & Loan Association the shares

of stock represented by this certificate as collateral security for a loan of dollars this day made to by said association.

Dated at.....this.....day of.....192....

Witness:

.....

[11]

Assignment

For Value Received hereby sell, assign and transfer all of the right, title and interest in and to the within shares of stock to..... of, who agrees to all the terms and conditions of the same, and hereby authorizes the transfer of said stock to the said upon the books of the Intermountain Building & Loan Asociation.

Witness hand this day of, 192.....

Witness

Acceptance

The above assignment is hereby accepted under the terms and conditions named herein.

Dated at this day of, 192.....

Witness:

.....

Received of the Intermountain Building & Loan Association Dollars for full amount due on this certificate and same is hereby surrendered and ordered cancelled this day of 192.....

Witness

.....

No. 10344
Name: Mr. and Mrs. Guadalupe R. Gallegos.
Address: Prescott, Arizona.
INTERMOUNTAIN
BUILDING & LOAN
ASSOCIATION
$20000.00
INSTALLMENT
SAVINGS
CERTIFICATE" [12]

VIII.

That the amount of debt due to the plaintiff, Inga G. Gudmundsen, exclusive of interest and costs, is the sum of $3,564.00, and all of it, together with accumulated interest thereon is secured by the lien hereinbefore mentioned and hereinafter described.

That on, to-wit, the 12th day of August, 1924, in the County of Yavapai, State of Arizona, plaintiff, Inga C. Gudmundsen, purchased an "Installment Savings Certificate" No. 12824 from the defendant upon monthly payments of $16.50 each, and paid thereon a total of $1,782.00, being the equivalent of 108 payments of $16.50 each, and the defendant issued to her its "Installment Savings Certificate", dated August 12, 1924, for *for $3,0000.00,* payable at the expiration of 126 months from that date, and promised and agreed with the said plaintiff that as security for the performance of its obligation thereunder that it would hold intact, subject to the constant examination and inspection of the Banking Department of the State of Utah, first mortgages

on improved real estate in an amount equal to at least 100 per cent of its liability thereunder, less the amount of any loans made on it or like certificates or any certificates issued in lieu thereof, and said promise and agreement is incorporated in and made a part of said "Installment Savings Certificate" No. 12824.

That no loan has been made upon said certificate nor on any like certificate to this plaintiff, nor has any certificate been issued in lieu of said certificate.

That on, to-wit, the 12th day of August, 1924, in the County of Yavapai, State of Arizona, Ida Mae Routon, at that time a citizen and resident of the County of Yavapai, State of Arizona, purchased from the defendant "Installment Savings [13] Certificate" No. 16410; and that subsequently plaintiff Inga G. Gudmundsen purchased said certificate from said Ida Mae Routon and the same was transferred to her upon the books of the defendant corporation, and the said plaintiff continued to make the payments therein contracted for by said Ida Mae Routon, and there has been paid thereon by plaintiff Inga G. Gudmunsen and her predecessor in interest the sum of $1782.00, being the equivalent of 108 payments at $16.50 each.

That the defendant issued to said Ida Mae Routon its "Installment Savings Certificate", dated August 12, 1924, for $3,000.00, (which certificate was subsequently transferred to Inga C. Gudmunsen, plaintiff herein, as above stated), payable at the expiration of 126 months from that date and promised and agreed with the said Ida Mae Routon that as

security for the performance of its obligations thereunder it would hold intact, subject to the constant examination and inspection of the Banking Department of the State of Utah first mortgages on improved real estate in an amount equal to at least 100 per cent of its liability thereunder, less the amount of any loans made on it, or like certificates or any certificates issued in lieu thereof, and said promise and agrement is incorporated in and made a part of said "Installment Savings Certificates" No. 16410.

That no loan has been made upon said certificate nor on any like certificate to this plaintiff, nor has any certificate been issued in lieu of said certificate.

IX.

That the amount of the debt due to the plaintiff, Mata E. Dexter, exclusive of interest and costs, is the sum of $1,996.50, and all of it, together with accumulated interest thereon is secured by the lien hereinbefore mentioned and hereinafter described.

That on to-wit: the 22nd day of June, 1923, plaintiff, Mata [14] E. Dexter, purchased an "Installment Savings Certificate" No. 7217 from the defendant upon monthly payments of $16.50 each, and paid thereon a total of $1,996.50, being the equivalent of 121 payments of $16.50 each, and the defendant issued to her its "Installment Savings Certificate" dated June 22, 1923, for $3,000.00, payable at the expiration of 126 months from that date, and promised and agreed with the said plaintiff that as security for the performance of its obliga-

tion thereunder, it would hold intact, subject to the constant examination and inspection of the Banking Department of the State of Utah, first mortgages on improved real estate in an amount equal to at least 100 per cent of its liability thereunder, less the amount of any loans made on it or like certificates or any certificates issued in lieu thereof, and said promise and agreement is incorporated in and made a part of said "Installment Savings Certificate" No. 7217.

That no loan has been made upon said certificate nor on any like certificate to this plaintiff nor has any certificate been issued in lieu of said certificate.

X.

That each of the certificates issued to the plaintiffs herein by the defendant herein contains the identical provisions as to the security and the creation of a lien to secure the payment of the indebtedness represented by said certificate, as are contained in Certificate No. 10344 hereinbefore set up.

XI.

That the nature of the lien securing the obligations of the defendant to these plaintiffs and each of them, as hereinbefore referred to, is, that as security for the performance of the obligations of the defendant herein it will hold intact subject to the constant examination and inspection of the Banking Department of the State of Utah, first mortgages on improved [15] real estate in an amount equal to at least 100 per cent of its liabilities

under its contracts with plaintiffs herein and under its contracts with others similarly situated, less the amount of any loans made by the defendant on any of the certificates issued to any of the plaintiffs herein or to persons similarly situated, on like certificates held by them.

XII.

That the said plaintiffs, Guadalupe R. Gallegos and Francesca Gallegos, his wife, fully performed all of the conditions of their contract with the defendant up to the 16th day of May, 1932, and not then being in default in their payments, did, prior to the 8th day of June, 1932, in accordance with the terms of their contract with the defendant herein, give notice of intention to withdraw, which notice of intention to withdraw was acknowledged by the defendant herein and filed by the defendant in its office as of June 8, 1932; but the defendant herein has failed, neglected and refused to carry out its contract with these plaintiffs and has failed, neglected and refused to pay them the sums due as the withdrawal value of said certificates, and has been in default thereon for a period of more than eight months. That the defendant being now insolvent does not own any funds out of which it could pay the agreed withdrawal value of said certificate without applying thereto assets on which other creditors of the corporation hold a lien.

XIII.

That the plaintiff, Inga G. Gudmundsen, complied fully with the terms of her contract with the de-

fendant up to the payment due in March, 1933, when, on learning that the defendant herein was insolvent and unable to carry out the terms of its contract with the plaintiff and was not meeting its obligations, she declined to make any further payments. [16]

XIV.

That the plaintiff, Mata E. Dexter, complied fully with the terms of her contract with the defendant up to the payment due in March, 1933, when on learning that the defendant herein was insolvent and unable to carry out the terms of its contract with the plaintiff and was not meeting its obligations, she declined to make any further payments.

XV.

That in, to-wit, the year 1922 the defendant herein applied to the Arizona Corporation Commission of the State of Arizona for a permit to do business within the State of Arizona.

XVI.

That the defendant corporation failed and neglected to file with the Corporation Commission of Arizona its by-laws as was required by the statutes of Arizona, and never has filed same and none are now on file with the Arizona Corporation Commission; and are not of record in this State.

XVII.

That it is provided by the statutes of Arizona that the liability upon agreements of the nature and kind of contracts and agreements that are the sub-

ject matter of this suit, shall at all times be the amount paid on account thereof, together with interest at the rate of six percentum thereon, and it is further provided that whenever corporations similar in character to the defendant shall be unable to pay off all debts due to creditors and to pay to holders of its outstanding contracts or agreements the amount paid on account thereof, together with interest at the rate of six per cent per annum thereon, such corporation shall be deemed to be insolvent.

XVIII.

That although the defendant herein contracted with the plaintiffs and each of them that it would hold intact, subject [17] to the constant examination and inspection of the Banking Department of the State of Utah, first mortgages on real estate in an amount equal to at least 100 per cent of its liability thereunder, less the amount of any loans made thereon, plaintiffs are informed and believe, and therefore, allege, that the defendant failed and neglected to do so, and still fails and neglects to do so.

XIX.

Plaintiffs further allege that the defendant is now insolvent and its liabilities exceed its assets in a sum in excess of $400,000.00; that its obligations of the same nature as those to the plaintiffs herein, which are secured in the same manner as the obligations to the plaintiffs herein, exceed in amount the sum of $2,300,000.00, exclusive of accumulated interest, and on part of these certificates the interest

has been accumulating for more than ten years without any payment thereon whatsoever.

XX.

Plaintiffs further allege that the defendant herein does not now own real estate mortgages in excess of the sum of $1,600,000.00 at their face value; that as a consequence thereof it cannot now carry out its contracts with the plaintiffs and those similarly situated, by holding intact mortgages to secure the indebtedness in the amount of 100% of its liabilities thereunder as provided in its contracts, and it has not enough of such mortgages on hand to secure even 60% thereof.

XXI.

That the defendant herein has failed to segregate the securities for the payment of its obligations to plaintiffs, and those similarly situated, and has disposed of the funds derived from collections made upon its real estate mortgages in a manner contrary to law and in a manner that has passed the control [18] thereof from the defendant, and as a result thereof, the assets of the corporation and the securities to which these plaintiffs, and others similarly situated, are entitled, are hopelessly mingled and entangled, and it is necessary that a receiver be appointed to make an equitable segre*ta*ion and distribution of securities and recover the securities so wrongfully disposed of by the defendant.

XXII.

Plaintiffs further allege that the controlling interest in the stock of this corporation has been acquired by a rival corporation, and that the affairs of this corporation are being run in the interest of said rival corporation and its owners, officers and stockholders without regard to the rights of the plaintiffs and others similar situated.

XXIII.

That the said defendant has been unable to carry out its obligations to the plaintiffs, and those similarly situated, for a period of more than twelve months prior to the filing of this complaint.

XXIV.

Plaintiffs further allege that this corporation has from its inception been hopelessly mismanaged and that the expenses incurred in the operation thereof have each year been far in excess of its income, after deduction from its gross income of the interest liability incurred by it on its obligations, and that in no single year during its operation has it made its expenses, and that as a consequence thereof it never accumulated any profits, and has been hopelessly insolvent for a period of more than seven years; that despite the fact that said defendant corporation has been conducted at a loss for all of these years, it has declared and paid dividends to its stockholders, although hopelessly insolvent at the time of the declaration and payment [19] of such dividends; that in no year since its inception has the

maximum amount of income which it would have been entitled to collect from the mortgages and other securities it owned or earnings derived from any other source, been sufficient to pay its expenses and the accumulated interest due to the plaintiffs, and others similarly situated.

XXV.

Plaintiffs further allege that defendant herein has paid large sums of money to withdrawing certificate holders, holding certificates similar to those of plaintiffs herein, while it, the defendant, was insolvent, the result being that some of the certificate holders have been paid in full while plaintiffs and those similarly situated will receive under any circumstances only a portion of the moneys due them.

XXVI.

That it has transferred many of its assets to other corporations and will continue to do so, unless this court appoints a receiver to take possession of the assets of the defendant within the State of Arizona, and apply them upon the obligations which the defendant contracted to secure.

XXVII.

That the defendant herein is advertising that it, together with other corporations known as "Intermountain Building and Loan Group", have a paid-in capital surplus in excess of $8,000,000.00 and is holding itself out to the public and inducing the public to invest its money by such false representa-

tions. That in so doing it is imperiling the assets of the defendant, subjecting it to actions at law and suits in equity that will destroy its assets and will destroy the securities covered by the lien of plaintiffs and those similarly situated.

That one of said advertisements, which has been widely circulated in the City of Phoenix and County of Maricopa, State of Arizona, is in words and figures as follows: [20]

"6%
Compounded Semi-Annually
on
Your Savings

INTERMOUNTAIN BUILDING AND
LOAN ASSOCIATON
Phoenix, Arizona

Member of
INTERMOUNTAIN BUILDING AND
LOAN GROUP

Intermountain Building and Loan Association
of Utah
First National Building and Loan Association
Home Building and Loan Company
Equitable Savings and Loan Association
Western Mutual Building and Loan Association
Intermountain Building and Loan Association
of Arizona

COMBINE PAID-IN CAPITAL SURPLUS
$8,250,000.00

INTERMOUNTAIN BUILDING AND LOAN ASSOCIATION

106 South Central Avenue

SAVINGS WITH SAFETY"

XXVIII.

That suits and actions have been filed against the defendant herein and are at issue and others are threatened and many of the holders of certificates have placed their claims in the hands of attorneys for collection and suit, and many creditors will obtain judgments against the defendant, sell the securities to which the plaintiffs and those similarly situated are entitled to have applied equally upon the certi- [21] ficates held by them and others similarly situated all to the great loss to plaintiffs and those similarly situated and an imperious necessity exists that a receiver be appointed immediately and without notice in order to prevent such multiplicity of actions and suits against the defendant and to prevent judgments in the suits now pending against the defendant and in actions and suits which are now threatened against the defendant.

XXIX.

That the corporation is not functioning for the purpose for which it was incorporated; is doing practically no new business, nor any profitable business, and has lost the confidence of the public to

such an extent that it can never be profitably conducted, and has lost all right to do any new business in Arizona.

XXX.

That the certified copy of the Articles of Incorporation and Amendments thereto, filed with the Arizona Corporation Commission show the following provisions with regard to the issue and nature of stock and the par value thereof, as follows:

"ARTICLE VI.

The subscribed capital stock of this corporation shall be Five Million Dollars, divided into three classes of stock, to-wit:

A. Expense Guarantee Stock;

B. Permanent Reserve Guarantee Stock;

C. Investors' Guarantee Dividend Stock;

which said stocks shall be issued in amounts as follows:

1. Ten Thousand shares of Expense Guarantee Stock of the par value of One Dollar per share, payable by the subscriber as follows, to wit: Five cents per share on subscription and the balance on call by the Board of Directors, which said [22] call shall not at any time exceed five cents per share, nor shall any call be made under thirty day periods. When such payments and all accumulated receipts credited to said stock shall equal One Dollar per share, said stock shall be fully paid and shall stand as a permanent stock to guarantee the expense of this corporation.

2. One Hundred Thousand Shares of Permanent Reserve Guarantee Stock of the par value of One Dollar per share, payable by the Subscriber as follows, to wit: Five cents per share on subscription, the balance on call by the Board of Directors which said call shall not at any time exceed two cents per share, nor shall any such call be made under ninety day periods. When such payments and all accumulated receipts credited to said stock shall equal One Dollar per share, said stock shall be fully paid and shall stand as a permanent stock, which shall be held to protect the corporation and guarantee all stocks, bonds, securities and creditors against loss.

3. Forty-eight Thousand Nine Hundred Shares of Investors Guarantee Dividend Stock of the mature par value of One Hundred Dollars per share, payable by the Subscriber in one installment or on such suitable installment plans as the Directors of this Corporation may by resolution enact. The Investors Guarantee Dividend Stock, when matured may be withdrawn by the owner thereof after giving thirty days' written notice to the company of intention to withdraw. The Investors Guarantee Dividend Stock may be withdrawn before maturity and the surrender value thereof received by the owner of said stock upon such terms and conditions and subject thereto as the Directors of this corporation may determine from time to time by resolution or as fixed by the by-laws of

the corporation. All withdrawals of Investors Guarantee Dividend Stock whether the same be made before or [23] after maturity shall be paid from the Investors Guarantee Dividend Stock Fund in the way and manner and as provided by law, these Articles of Incorporation and by-laws of this corporation."

XXXI.

That said Articles show the following provisions with regard to the conditions under which directors would be eligible to the elected, as follows:

"ARTICLE VII.

The management of the affairs of the association shall be vested in a Board of Directors, which shall consist of seven (7) persons, divided into three classes. Directors of the First Class shall be three (3) in number, and shall be elected for a term of one (1) year. Directors of the second Class shall be two (2) in number and shall be elected for a term of two (2) years, and Directors of the third class shall be two (2) in number and elected for a term of three (3) years, so that the term of office of one class shall expire in each year, and shall be elected at the regular annual stockholders' meeting, provided, that at the first regular stockholders' meeting there shall be elected a total of seven (7) directors to serve for the respective terms, and provided, further that all directors shall serve until their successors are elected and qualified. No person shall be eligible to the

office of Director of this association who is not the owner of at least Five Hundred (500) shares of stock as shown by the corporation's books. The number of directors of the association may be increased or decreased to any legal number by resolution of the Board of Directors. The Board of Directors shall select and appoint such employees and agents as they might deem advisable, define the authority of each and prescribe his duties. Seven [24] of the incorporators hereof shall serve as Directors until the next annual stockholders' meeting and until their successors are elected and qualified.

XXXII.

That an imperious necessity exists for the immediate appointment of a receiver in order that the property of the defendant may be immediately placed in custodia legis and the receiver placed in possession of the assets of the defendant within the State of Arizona and apply them upon obligations which the defendant contracted to secure; to avoid a multiplicity of suits and actions against the defendant; to prevent a waste of its assets in litigation and forced sales; to avoid the loss of the $6000.00 per month that is now being expended as expenses of the defendant in excess of its monthly earnings; that the income from its mortgage loans be husbanded to meet the accumulating interest charges and the principal of the lien indebtedness due to plaintiffs and others similarly situated; to take possession of and protect the real estate owned by the defendant corporation within the State of

Arizona and collect the rents accruing thereon; to prevent the removal of the assets of the defendant from the State of Arizona, including the books and records of the defendant corporation which are now within the jurisdiction of this Court, for the reason that the books and records of the defendant are necessary for the preservation of the rights of plaintiffs and others similarly situated; to eliminate the useless expense and extravagance that is wasting the assets of the corporation as it has been wasted heretofore during the whole period of its existence; to recover assets of this corporation wrongfully transferred to other corporations before rights of innocent purchasers accrue in regard to them; to prevent any other liens being procured by judicial proceedings or otherwise against the property of the defendant corporation which would be superior to the rights of [25] plaintiffs and those similarly situated, and to prevent irreparable loss and damage to these plaintiffs and others similarly situated.

XXXIII.

For these reasons it is necessary that a restraining order issue forthwith restraining and enjoining defendant, its officers, agents, employees, deputies and servants and all persons acting by, through or under it, or its successors or assigns, from removing, concealing, or destroying or disposing of any of the files, papers, records, documents, monies, securities, choses in action, books of accounts and all other property of the defendant now within the State and District of Arizona and the jurisdiction

of this Court, until the application for the appointment of a receiver herein can be heard and determined.

Wherefore, Plaintiffs Pray:

(1) That this Court make an order and decree establishing the lien of each of the plaintiffs herein and each person similarly situated, upon all of the real estate mortgages held or owned by the defendant corporation on behalf of themselves and others similarly situated, and finding and determining the amount of the lien of each of the plaintiffs herein and those similarly situated, and determining the amount of the indebtedness to each of the plaintiffs herein and to those similarly situated; and that a receiver be appointed in this suit to take possession of all of the assets of said defendant corporation in this State, and all of its books and records; and that said receiver be instructed to report to the Court a segregation and partition of all of the real estate mortgages held by the defendant herein and apply them as security to the debts due the plaintiffs individually and others similarly situated individually; and that an account be taken of all of the affairs [26] of said defendant and that the Court upon said report by the receiver make such orders and decrees with reference thereto as to the Court may seem meet and proper.

(2) That a receiver be appointed for the defendant herein with authority to take into his possession all of the assets of said corporation and all of its books, records and accounts, including all choses in action.

(3) That said receiver be authorized, directed and instructed to take possession of all of the effects of said defendant corporation, including its real property, and to continue and operate the business of the defendant, subject to the orders of this court; that he shall take charge of all of the real estate of the defendant, keep the same in good condition and repair, and collect the rents thereof.

(4) That such receiver shall have authority to employ, pay and discharge from time to time in his discretion all needful laborers, servants, agents, attorneys and counsel; to purchase and pay for all needful materials and supplies; to pay all taxes on the property whereof he is appointed receiver that may be due or payable or may become due and payable during his receivership; to prosecute and defend without further order of this Court all existing actions by or against said defendant, and to defend all actions that may hereafter be brought against said defendant corporation, or against himself as such receiver by the permission of this Court; to pay the expenses of such prosecutions and defenses; and also the expenses and disbursements of the plaintiffs in and about the appointment of said receiver; to use the name of the defendant in the prosecution of all such actions that he may find it proper or necessary in his discretion to bring, maintain or defend, with full power to compromise, adjust and settle in his discretion all such actions, suits or controversies now [27] existing or that may hereafter exist, subject always to the confirmation thereof by this Court.

(5) That as soon as may be after said receiver has entered upon the performance of his duties, he shall make a true, full and correct inventory of all and singular the real and personal property of every kind and description whereof he is appointed receiver, and which may come into his possession, and file the same with the Clerk of this Court, and due notice of said filing be given to plaintiffs' solicitor.

(6) Said receiver shall keep a full, true and accurate account of all and singular his acts and doings in the premises; render and file with the Clerk of this Court such accounts, and shall also ascertain and furnish this Court with a true statement of the assets and liabilities of said corporation as they shall be obtained by him as Receiver, and for this purpose he shall be authorized to employ an auditor to assist him in such work.

(7) That the Court establish by decree the amount due to plaintiffs, and all others similarly situated, and the amount of real estate mortgages that shall be apportioned to them under their liens as set up in this complaint, and that the receiver shall be instructed to segregate the same and hold them subject to the rights of these plaintiffs and all persons similarly situated, and be subject to the inspection of all parties interested.

(8) That a temporary receiver of said defendant be appointed with the usual powers of temporary receivers in like cases, including all the powers heretofore enumerated in this prayer.

(9) That a permanent receiver of the defendant corporation be appointed with the usual powers of receivers in [28] like cases, including all the powers heretofore enumerated in this prayer.

(10) That a temporary receiver be appointed for all the property of the defendant within the State of Arizona, said receiver to have the usual powers of receivers in like cases, including all the powers enumerated in this prayer.

(11) That a permanent receiver of the defendant corporation be appointed for all the property of the defendant corporation within the State of Arizona, said receiver to have the usual powers of receivers in like cases, including all the powers enumerated in this prayer.

(12) That said receiver be authorized and directed to take possession of all of the monies, assets and property of the defendant Intermountain Building and Loan Association, and hold and operate the same pending the final determination of this action.

(13) That an accounting be had between the defendant corporation and each of the plaintiffs herein and of all others similarly situated, and a judgment, order and decree be rendered herein in favor of each of them for such amount as may be found to be due them by the defendant herein and a lien established, upon the real mortgages in possession of the defendant or that may hereafter come into the hands of the receiver to be appointed herein in accordance with the contract set up in this complaint.

(14) That pending a hearing upon plaintiffs' application for the appointment of a receiver, a temporary restraining order be granted forthwith without formal notice, restraining and enjoining defendant, its officers, agents, employees, deputies and servants and all persons acting by, through or under it, or its successors or assigns, from removing, concealing, destroying or disposing of any of the files, papers, [29] records, documents, monies, securities, choses in action, books of account, and all other property of the defendant now within the State and District of Arizona and the jurisdiction of this Court, until such time as plaintiffs' application herein for the appointment of a receiver be heard and determined.

(15) That the Court grant to your plaintiffs a writ of subpoena of the United States issued out of and under the seal of this Honorable Court, directed to said defendant, and commanding it on the day therein to be named, and under certain penalty, to be and appear before this Honorable Court, then and there to answer all and singular the premises, and to stand and perform and abide by such order, direction and decree as may be made against said defendant in the premises.

(16) That plaintiffs have such other and further relief as to the Court may seem meet and proper, or to which they may be entitled, either at law or in equity.

(17) That plaintiffs have their costs herein incurred.

(18) And your plaintiffs averring that this is the first application for an injunction touching on the matters set forth in said complaint and will ever pray.

ELIZABETH G. MONAGHAN
Solicitor for Plaintiffs,
Prescott, Arizona.

State of Arizona,
County of Maricopa—ss.

Elizabeth G. Monaghan, being first duly sworn on oath, deposes and says:

That she is solicitor for each of the plaintiffs in the above entitled action and has been duly authorized by each of them to make this verification for and on behalf of each of them; that she has read the foregoing complaint and knows the [30] contents thereof; that she has knowledge of the facts upon which relief is asked in said complaint and knows that this suit is not a collusive one to confer on the court of the United States jurisdiction of a case of which it would not otherwise have cognizance. That the allegations in said complaint are true in substance and in fact.

ELIZABETH G. MONAGHAN

Subscribed and sworn to before me this 9th day of June, 1933.

(Notarial Seal)

BESS M. WHITE
Notary Public

My commission expires: June 18, 1935.

Received copy of the within instrument this 19 day of June, 1933.

R. G. LANGMADE
Solicitor for Defendant.

[Endorsed]: Filed Jun 23 1933. [31]

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
State of Arizona,
County of Maricopa.—ss.

James A. Smith, being first duly sworn, on oath deposes and says:

That he is a certified public accountant and has been for many years engaged in that line of work and is familar with the accounting methods employed in corporations of the nature of the defendant in the above entitled cause.

That at the instance of the solicitor of the plaintiffs in the above entitled suit he examined the affidavits of Kathleen Nelligan and Gertrude Casto hereto attached, together with the copies of the statements and reports of the defendant in this action filed in the office of the Bank Commissioner of the State of Utah. That the affidavits of said Kathleen Nelligan and Gertrude Casto are to the effect that the copies of the reports of the defendant attached to their affidavits are true and correct copies of the statements and reports of the defend-

ant filed with the Bank Commissioner of the State of Utah.

That he has also examined the affidavit of Elizabeth G. [32] Monaghan hereto attached and examined and checked the calculations upon which her affidavit is based and that he found her calculations to be true and correct and the results arrived at and set up in her affidavit as to the financial condition of the defendant corporation to be correct.

That your affiant has checked each of the statements attached to said affidavits of Kathleen Nelligan and Gertrude Casto as to the assets and liabilities of the defendant and as to its receipts and disbursements, and that from these records, assuming the facts stated in said affidavits to be true and assuming that the verified reports of the defendant filed with the Bank Commissioner of the State of Utah, copies of which are attached to the affidavits of Kathleen Nelligan and Gertrude Casto, are true and correct, this affiant finds from an examination thereof and a checking of all of its facts and figures, that defendant in this suit is now and has been for a period of more than seven years, insolvent, and that its liabilities have exceeded its assets during all of said period of seven years, and do now exceed its assets.

Affiant further states that he has found from a calculation based on said affidavits and reports, that during the entire period from 1921 to 1932, inclusive, the expenses of doing business of said defendant, together with the interest liability incurred by it upon installment savings certificates and other

forms of indebtedness has been in excess of the maximum amount of income it could have received from the interest upon real estate mortgages and other securities held by it, together with any other forms of income that it has reported to the Bank Commissioner during these periods in its verified statements as shown in the affidavits hereinabove referred to.

That assuming the facts stated in said affidavits and reports are true, the said defendant is now insolvent and its liabilities exceed its assets in a sum in excess of $400,000.00, [33] and that the outstanding obligations to the plaintiffs herein and others similarly situated exceed in amount the sum of $2,300,000.00, exclusive of accumulated interest, and part of the interest has been accumulating for more than ten years without any payment thereon whatsoever, and that the defendant does not own or hold real estate mortgages in excess of the sum of $1,600,000.00; that the defendant herein has been insolvent for more than seven years prior to the making of this affidavit; that the said records, files and verified reports in the office of the said Bank Commissioner of the State of Utah, as shown by the affidavits herein referred to, show an aggregate loss from the time that the defendant first started its business up to and including the 31st day of December, 1932, in excess of the sum of $500,000.00, and that its loss during the year 1932 was in excess of $70,000.00.

JAMES A. SMITH, C.P.A.

Subscribed and sworn to before me this 8 day of April, 1933.

(Notarial Seal) WM. G. FLAY,
Notary Public

My commission expires August 21, 1933.

[Endorsed]: Filed Apr. 18, 1933. [34]

United States Circuit Court of Appeals
for the Ninth Circuit

No. 7516

INTERMOUNTAIN BUILDING & LOAN ASSN. et al.,

vs.

GUADALUPE R. GALLEGOS, et al, etc.

MANDATE

United States of America,—ss.

The President of the United States of America
To the Honorable the Judges of the District Court of the United States for the District of Arizona —Greeting:
(Seal)

Whereas, lately in the District Court of the United States for the District of Arizona, before

you, or some of you, in a cause between Guadalupe R. Gallegos, and Francesca Gallegos, his wife, Inga G. Gudmundsen, and Mata E. Dexter, in their own behalf, and in behalf of others similarly situated, plaintiffs, and Intermountain Building and Loan Association, a corporation, defendant, Edward O'-Reilly, Kitty R. Crossman, and Frank W. Nelson, Intervenors, H. C. Smoot, and Sophia Smoot, Intervenors, No. E-268, an order was duly entered on the 10th day of April, 1934, and an Order Appointing Receiver Pendente Lite, was duly filed on the 20th day of April, 1934, which said orders are of record and fully set out in said cause in the office of the Clerk of said District Court, to which reference is hereby made, and the same is hereby expressly made a part thereof, and as by the inspection of the Transcript of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal prosecuted by Intermountain Building and Loan Association, a Corporation, and J. A. Malia, Bank Commissioner of the State of Utah, as appellants, against Guadalupe R. Gallegos, and Francesca Gallegos, His Wife, Inga G. Gudmundsen and Mata E. Dexter, in their own behalf and in behalf of others similarly situated, H. C. Smoot and Sophia Smoot, his wife, as appellees, agreeably to the Act of Congress in such cases made and provided, fully and at large appears:

And Whereas, on the 28th day of February in the year of our Lord One Thousand, Nine Hundred and Thirty five the said cause came on to be heard before the said Circuit Court of Appeals, on the said Transcript of the Record, and was duly argued and submitted. [35]

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the orders of the said District Court in this cause be, and hereby are affirmed, with costs in favor of the appellees and against the appellants.

It is further ordered, adjudged and decreed by this Court, that the appellees recover against the appellants for their costs herein expended, and have execution therefor.

(August 5, 1935)

You, Therefore, Are Hereby Commanded, That such execution and further proceedings be had in the said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness, the Honorable Charles E. Hughes, Chief Justice of the United States, the 18th day of No-

vember, in the year of our Lord One Thousand Nine Hundred and thirty-five.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Amount of Costs Allowed and Taxed

In favor of appellees and Against appellant as per Annexed Bill of Items, taxed in Detail: $20.00.

PAUL P. O'BRIEN

Clerk [36]

BILL OF ITEMS ANNEXED TO MANDATE PURSUANT TO SECTION 5, RULE 31

Item No.	Debit Items	Dr.	Cr.
1	Docketing the Case and Filing the Record	5.00	
2	Entering 3 Appearances	.75	
3	Entering Continuances		
4	Entering 3 Orders	.60	
5	Filing 37 Papers	9.25	
6	Filing 20 copies of printed record	5.00	
7	Filing Briefs for Each Party Appearing 3	15.00	
8	Filing		
9			
10			
11	Transferring Cause on Printed Calendar (2)	2.00	
12	Drawing, Filing and Recording Decree or Judgment	1.65	
13			
14	Filing Petition for a Rehearing	5.00	
15			
16	Issuing Certified Record on Certiorari Petition	30.60	

Bill of Items Annexed to Mandate Pursuant to Section 5, Rule 31—(Continued)

Item No.	Debit Items	Dr.	Cr.
17	Telegram from Clerk US SC	2.71	
18			
19	Issuing Mandate, $5.00; ~~costs and Copy $.40~~	5.00	
20			
21	Total, Miscellaneous Costs	82.96	
22	Expense, Printing Record, R. 23:	324.09	
23	Expense, Printing Proceed CCA	46.04	
24	Total of Debit Items	453.09	
	Credit Items		
1	Deposit Rule 17 Moore & Shimmel		35.00
2	Additional Deposits Moore & Shimmel (JAMoore)		75.16
3			
4			
5	Expense Printing Record, R. 23: M & S		324.09
6	Expense Printing Proceedings, C.C.A. M.&S		46.04
7	Total of Credit Items		480.29
8	Balance refund (Moore & Shimmel)		27.20
	Totals	453.09	453.09

	Itemized Bill of Costs Allowed and Taxes	Amount
1	Certified Cost of Transcript from Court Below	
2		
3	Deposits Account Misc. Costs	
4	Total Expense, Printing Record	
5	Expense Printing Proceedings, C.C.A.	
6		

Bill of Items Annexed to Mandate Pursuant to Section 5, Rule 31—(Continued)

Item No.	Debit Items	Dr.	Cr.
7	Attorney's Docket Fee		20.00
8	Balance Costs		

Total (Inserted in Body of Mandate)
Taxed at 20.00

Attest: PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed Dec 2 1935. J. Lee Baker, Clerk, United States District Court for the District of Arizona. By Jerome L. Buchanan, Deputy Clerk.

[37]

PETITIONER MONAGHAN'S EXHIBIT B

In the District Court of the United States for the Federal District of Arizona.

No. E-268—Phoenix

GUADALUPE R. GALLEGOS, FRANCESCA GALLEGOS, his wife, INGA G. GUDMUNDSEN AND MATA E. DEXTER, in their own behalf and in behalf of others similarly situated,

Plaintiffs,

vs.

INTERMOUNTAIN BUILDING & LOAN ASSOCIATION,

Defendant.

PETITION OF ELIZABETH G. MONAGHAN FOR ALLOWANCE OF ATTORNEYS' FEES FOR LEGAL SERVICES RENDERED AND EXPENSES INCURRED AND EXPENSES FOR WHICH THE ATTORNEYS BECAME OBLIGATED, IN THE PREPARATION AND TRIAL OF THE ABOVE ENTITLED SUIT.

Comes now Elizabeth G. Monaghan, and respectfully presents to this court her petition for allowance of attorneys' fees for legal services rendered and expenses incurred and expenses for which the attorneys became obligated, in the preparation and trial of the above entitled suit, wherein petitioner was employed to represent the plaintiffs and others

Petitioner Monaghan's Exhibit B (Cont.)

similarly situated, not specifically named as plaintiffs therein but who were represented by the plaintiffs named and who accepted and participated in the benefits resulting therefrom; 2,792 of them having elected to accept the benefits of petitioner's efforts in the premises, such benefits consisting in the recovery for their benefit of a trust fund of more than two million dollars, namely $2,119,662.82, which would otherwise have been dissipated and totally lost to them; and in support of this petition alleges the following:

I.

PETITIONER'S PROFESSIONAL EXPERIENCE.

Petitioner has been since 1923, and now is, a member of the [38] Bar of the Supreme Court of Arizona and of the United States District Court for the Federal District of Arizona, and has been at all times since said date in active practice before the state Courts of Arizona and the Federal Courts of the District of Arizona.

Petitioner is now and has been for many years a member of the State Bar of California and of the United States Circuit Court of Appeals for the Ninth Circuit.

II.

PETITIONER'S EMPLOYMENT.

During the first part of the year 1932 petitioner was employed by lienholding creditors of the Inter-

Petitioner Monaghan's Exhibit B (Cont.)

mountain Building & Loan Association, the defendant above named, and spent a number of months in investigating the affairs of said defendant, as well as filing a suit in the state court, as hereinafter set forth. On March 3, 1933, petitioner was authorized by the above named plaintiffs by written instruments to bring such actions or suits as she might deem proper and advisable as against the Intermountain Building & Loan Association, an Utah corporation, and to take such action as she might deem necessary for the appointment of a receiver for said corporation, and to associate any other attorney with her, should she deem it advisable.

ASSOCIATE COUNSEL.

Following the institution of said suit on April 18, 1933, your petitioner associated Joseph M. Nealon, an attorney at law of El Paso, Texas, as counsel for the purpose of the hearing on May 8, 1933, of the motion to dismiss filed by the defendants, and following the filing of the amended complaint on June 23, 1933, your petitioner associated with her, Hon. Thomas W. Nealon, an attorney at law, of Phoenix, Arizona, to assist her in such litigation. That said Thomas W. Nealon was an outstanding member of the bar of the state of Arizona, and a large portion of his practice in Arizona since 1914, has been on the equity side of the Federal Court.

[39]

Petitioner Monaghan's Exhibit B (Cont.)

III.

Immediately upon being employed in the first part of 1932, as aforesaid, your petitioner began an investigation of the affairs of said corporation, searching all available sources of information to ascertain the financial condition of said corporation, the nature and extent of its assets and liabilities, the conduct of its officers and directors, as well as a study of the law applicable to the existing situation.

IV.

In the course of this investigation, your petitioner discovered that the business of the defendant corporation was being conducted in a manner contrary to law, extravagantly, wastefully, and in a manner that would ultimately result in the waste and dissipation of all of the assets of the corporation, and that the corporation had been insolvent from about the year 1922, if not before that date, and that it was not a true building and loan association but a fraudulent corporation.

V.

RESULTS OBTAINED FOR BENEFIT OF CREDITORS.

As a result of the investigation made by your petitioner, which is outlined more fully hereinafter, your petitioner, on April 18, 1933, instituted the above suit, and filed an amended complaint in June, 1933. Following the filing of the amended complaint, your petitioner, with the assistance of said Thomas

Petitioner Monaghan's Exhibit B (Cont.)

W. Nealon, represented said creditors in all proceedings until final judgment, although those in control of the corporation opposed relief for plaintiffs and those similarly situated all the way to the Supreme Court of the United States. Your petitioner, and her co-solicitor, were successful in every step, notwithstanding the great hazard of success, owing to the difficulty of procuring evidence, the novel questions involved, and the brilliant array of attorneys retained to oppose your petitioner and [40] her co-solicitor, all of which is more fully set forth hereinafter.

The success of your petitioner and her co-solicitor in this litigation resulted in saving to the creditors of the Association, assets of a value of $2,119,-662.82, the following being a summary of the assets of said defendant corporation now in the actual or constructive possession of the receiver of said corporation:

The Arizona assets, as per inventory of April 1, 1937, have a value as per the books of the corporation and receiver of		$1,597,841.89
The assets in other states, as shown in inventories of November 30, 1935, and April 1, 1937, amount to		1,135,229.34
Total		2,733,071.23
Less allowance for loss on realization:		
On Arizona assets	$248,228.54	
On assets in other states	365,179.87	
Total allowance for loss on realization as per report of H. S. McCluskey		613,408.41
Realization value of all assets		$2,119,662.82

Petitioner Monaghan's Exhibit B (Cont.)

In addition thereto, choses in action against M. E. Waddoups and other directors of the defendant corporation, from which should be realized $100,000.00; and against the bonding company bonding the officers and directors, in the sum of $50,000.00.

That 2,792 of the creditors of said corporation elected to avail themselves of the benefit of the decree obtained through the efforts of solicitors for plaintiffs.

VI.

Petitioner, and her co-solicitor, found upon their investigation, that some 3,840 were creditors of said Association; the bulk of these creditors being people of limited means, among them widows, orphans, guardians and old people, endeavoring to safely invest $5.50 per month and thus in the course of ten and one-half years accumulate $1,000.00; they possessed but limited business experience which was not sufficient to enable them to analyze the complicated corporate structure of the defendant [41] corporation and they were influenced in making their investments by plausible propaganda presented by the corporation through newspaper articles, circulars and printed matter, as well as by high-pressure salesmen. And in the contract itself, it was specifically provided that the corporation should hold in trust for each of the plaintiffs and those similarly situated, real estate mortgages in the amount of 100% of the amount due to each of them, and that these securities in the trust fund should be subject to the constant inspection of the banking officials

Petitioner Monaghan's Exhibit B (Cont.)

of Utah or of the state in which the creditor resided.

CONTRACT TRUST PROVISION.

The contract contained the following provision:

"PRIVILEGES AND CONDITIONS.

Security. As security for the performance of the obligations of the Association hereunder, the Association will hold intact, subject to the constant examination and inspection of the banking department of the State of Utah, first mortgages on improved Real Estate in an amount equal to at least one hundred percent of its liabilities hereunder, less the amount of any loans made on this and like certificates or any certificates issued in lieu thereof."

VII.

DISCLOSURES OBTAINED BY INVESTIGATION.

Investigation disclosed many wrongful acts committed by the defendant corporation resulting in the waste and dissipation of its assets and of the trust funds entrusted to it, and which caused the insolvency of the defendant corporation, some of which were as follows:

Petitioner Monaghan's Exhibit B (Cont.)

UNLAWFUL EXPENDITURES.

During a period of 3½ years there had been unlawfully paid to one M. E. Waddoups, as commissions on the sale of securities of the Intermountain Building & Loan Association (in many instances he receiving all that was paid in to the corporation by the lender, the sum of	$ 482,886.00
Dividends had been paid to said Waddoups and his [42] associates, that were never earned by the corporation and which were wrongfully paid from the trust fund belonging to the plaintiffs and others similarly situated, amounting to	418,649.50
That loans had been improvidently made, a large percentage of which were made in violation of the Articles of Incorporation and By-Laws of the Association, resulting in a loss of	765,182.78
The total loss on these three items alone being	$1,666,718.28

In addition to the above your petitioner and her co-solicitor found that an exorbitant and fictitious salary, the amount being impossible to estimate, was being paid to said Waddoups as president of the defendant corporation, and had been during a long period of time upon a basis of $24,000.00 per year, approximately 45% of which came from the trust fund belonging to the plaintiffs and those similarly situated, and which were paid in violation of the Articles of Incorporation and By-laws of the Association, while said Waddoups devoted only a part of his time to the business of the Intermountain Building & Loan Association.

Petitioner Monaghan's Exhibit B (Cont.)

WRONGFUL MANAGEMENT.

Petitioner, and her co-solicitor, found that said M. E. Waddoups had dominated and controlled said corporation absolutely from the time of its organization in Utah in 1921, until his stock therein was purchased by one Daniel Alexander, in, to-wit: October of 1924, and that upon losing control of said corporation, he moved from Salt Lake City, Utah, to Phoenix, Arizona, where he organized the First National Building and Loan Association, and through said latter corporation again obtained control of the defendant corporation in, to-wit: August 1930, and that at all times subsequent to that date up to the time of the appointment of the receiver herein by this Court he retained such control and manipulated its affairs for the benefit of himself and to [43] *and to* the injury of the plaintiffs and those similarly situated.

WILFUL AND NEGLIGENT CONDUCT.

Said Waddoups was using the funds of the Association to finance the operations of the Lincoln Mortgage Company, a company largely owned and absolutely dominated by him, and the defendant corporation suffered extreme losses through the manipulation of loans made upon buildings erected by said Lincoln Mortgage Company.

Prior to the organization of the defendant corporation, said Waddoups had entered into a secret contract with one Danield Alexander, in which it was agreed

Petitioner Monaghan's Exhibit B (Cont.)

that said Alexander should be elected President of the defendant corporation, and that Waddoups should not be an officer, but should receive a large commission upon all contracts issued by the corporation of similar tenor to those held by plaintiffs, and that they were to divide these profits derived from this transaction. Later Alexander sued Waddoups for his portion under such agreement but Waddoups settled said suit before it came to trial.

Losses of an extremely large amonut, the actual figures of which cannot be obtained, were suffered by the corporation through the negligence of its officers and directors in permitting taxes to accumulate on property on which they held mortgages, (some as long as ten years) and in some cases the total of the delinquent taxes amounted to more than the value of the property. As a result of this negligence many properties were lost through tax sales, and other properties necessarily had to be abandoned. Nor did these officers and directors of the corporation take any steps in court necessary to secure the payment of such taxes from the rental value of the properties.

In the year 1931 alone, unlawful dividends paid to the president of the Association and his associates amounted to some $119,312.68. During the same period, expenses, salaries, costs [44] of collection and other items ran the expense up to $218,718.79; a sum greater than could have been collected from the interest of all of the mortgages held by the corporation and the rents from all the properties owned

Petitioner Monaghan's Exhibit B (Cont.)

by the corporation. The losses of the corporation during that period alone was probably in excess of $240,000.00.

The Association had paid large sums of money to withdrawing certificate holders while it was insolvent, with the result that some of such holders had been paid in full while the plaintiffs and those similarly situated would receive under any circumstances only a portion of the money due them.

The Association had been transferring and was continuing to transfer many of its assets to other corporations.

The Association was not functioning for the purpose for which it was incorporated, was doing practically no new business or any profitable business and had lost the confidence of the public to such an extent that it could never be profitably conducted, and had lost all right to do any business in Arizona.

VIII.

INSOLVENCY.

The investigation disclosed that the conduct of the officers and directors of the defendant corporation had been such that at the time your petitioner filed suit herein, she alleged that the liabilities of the corporation exceeded the assets of said corporation by more than $400,000.00 (the liability was later found to be in excess of $700,000.00) and that the corporation was hopelessly insolvent and had been so since 1922. Its paid-in capital never exceeded $3,460.00, and this was exhausted before

1922, and from that time on it operated on money borrowed from its creditors.

IX.

CONCEALMENT OF TRUE STATE OF AFFAIRS.

The true state of affairs of the corporation was concealed [45] from the creditors and the public by the fact that the total liabilities on obligations like those held by the plaintiffs and those similarly situated, never appeared upon the books of the company, and further by the fact that thousands of these obligations had been written off on the records of the corporation as if they had been forfeited, there being no authority of law whatsoever permitting the corporation and its officers so to do. As a result thereof, there were hundreds of the creditors of said association who were entitled to participate in this trust fund, whose rights had been totally lost. A large portion of the funds so "forfeited" was absorbed by said Waddoups and his associates through a particular form of stock called "expense fund stock", although said funds belonged in a trust fund for the purpose of protecting those who had furnished money to buy the securities.

X.

FUNDS WRONGFULLY SENT OUT OF STATE.

The officers and directors of the corporation also sent large sums of money out of the state for the

Petitioner Monaghan's Exhibit B (Cont.)

purpose of giving a preference to residents of other states in the matter of the payment of claims similar to those of the plaintiffs herein and those similarly situated. Among these sums so taken, $40,000.00 was sent to California in 1929, and $50,000.00 in 1932, which sums were invested in securities that are now held in California. (suit is now pending to recover the same for the benefit of the plaintiffs and those similarly situated and is being conducted for and on their behalf, the present receiver of the corporation also being a party thereto). There was also a similar attempt to give a preference to residents of Oregon and Wyoming,—all in violation of the rights conferred upon the plaintiffs and those similarly situated.

XI.

FRAUDULENT ADVERTISING [46]

The officers and directors of the defendant corporation also published in newspapers and circulars, false reports that the defendant corporation and five other building and loan associations, known as the Intermountain Building and Loan Group, dominated by said M. E. Waddoups, had a capital and surplus in excess of $8,000,000.00, at a time when each of these associations was insolvent and when approximately 45% of this amount represented liabilities of the defendant corporation, these reports being made with the intent of securing further contributions from persons situated as were the plaintiffs in this suit, and inducing the public to invest its

Petitioner Monaghan's Exhibit B (Cont.)

money with the defendant by such false representations.

XII.

FAILURE OF UTAH BANK COMMISSIONER TO ACT.

The defendant corporation was charged by law with the duty of filing reports showing its financial condition, with the Banking Department of the State of Utah, and did make such purported reports each year for the years 1921 to and including 1932. Although the contracts issued to the plaintiffs and those similarly situated provided that the funds of said association should be invested in first mortgages on improved real estate in an amount equal to at least 100% of its liabilities therein, and that the mortgages should be at all times subject to the constant examination and inspection of the Banking Department of Utah, and although the Banking Department of Utah was empowered to make complete examinations of the affairs of said defendant corporation, and did make numerous investigations thereof, and although by these reports and these examinations the said Bank Commissioner was fully informed, or by reasonable diligence could have been informed of the unsafe and unsound condition of said defendant corporation and the misconduct of its officers in declaring dividends from trust funds, and other misconduct and neglect of its [47] officers, and the insolvency of the corporation during all of the period from 1922 to 1932, the Bank Commissioner

Petitioner Monaghan's Exhibit B (Cont.)

of Utah, with all this information before him, and with all these resources at his command, failed, refused and neglected to take any steps for the protection of these plaintiffs and those similarly situated.

XIII.

THREATENED REMOVAL OF ALL ASSETS.

Petitioner during the course of her investigation of the affairs of the defendant corporation in the year 1932, received information from reliable sources that the corporation was planning to remove all of its personal property, including promissory notes and mortgages, and its books and records, out of the state of Arizona, and out of the jurisdiction of the courts of Arizona, so as to render it practically impossible for its creditors to protect their rights and which would force them to a foreign jurisdiction in search of redress, which redress could only have been secured at a prohibitive cost, and then only by actions similar to that taken by your petitioner. Petitioner was also informed that the corporation had made settlements with the plaintiffs in the suits pending at that time in the state court so that the court would release the assets of the Intermountain Building & Loan Association from its control in order that these assets could be removed from the state of Arizona.

XIV.

In order to prevent such removal of the assets of the defendant corporation from the jurisdiction of

Petitioner Monaghan's Exhibit B (Cont.)

the courts of Arizona, your petitioner, on June 23, 1932, by telegram from Chicago, Illinois, where she was on said date, authorized Thomas W. Nealon, her co-solicitor in this suit, to institute suit in the name of her clients, and on the 27th day of June, 1932, the said Thomas W. Nealon, jointly with petitioner, instituted such proceedings in the Superior Court of Arizona, in and for the County of Maricopa, [48] as resulted in the prevention of the removal of the personal property of the defendant corporation from Arizona, and thus preserved for the benefit of the plaintiff herein and those similarly situated, such assets and records which would otherwise have been lost.

In these proceedings in the state court, your petitioner and her associate counsel, were opposed by many eminent members of the Arizona Bar, including Messrs. John L. Gust, Charles B. Ward, Alexander B. Baker, Louis B. Whitney and L. L. Howe.

XV.

It was obvious from the investigations made by your petitioner, that if a court of equity did not restrain the waste, mismanagement, misapplication of funds and the dissipation of the assets of the defendant corporation, all of the assets would be dissipated in a short time, and every investor in this Association would lose every dollar they had put in, and the only way this could be prevented was for this Court to take constructive possession of such assets and appoint some reliable person of its own selection to husband

Petitioner Monaghan's Exhibit B (Cont.)

the dwindling assets of the corporation for the benefit of the creditors of the association, and on the 18th day of April, 1933, your petitioner personally, filed in said United States District Court for the District of Arizona, a suit in equity for the purpose of recovering the trust fund herein described and conserving the assets of said corporation, of having a receiver appointed for that purpose, and of obtaining a restraining order and injunction to prevent the disposition or removal of such assets pending suit. An amended petition was filed by your petitioner on June 23, 1933.

XVI.

CLASS SUIT.

The plaintiffs above named were among the lien-holding creditors who employed your petitioner to institute suit, and said suit was filed in behalf of said creditors and all others similarly [49] situated, the persons so situated being too numerous to be made parties to the suit, the bill of complaint containing the following paragraph:

> "That the plaintiffs bring this action on behalf of themselves and for all others similarly situated who desire to come in and bear their proportion of the expense of this suit; that the persons so situated are too numerous to be made parties to this action."

The instant suit was not filed until the insolvency of the corporation and the misconduct of its officers had become widely known, as well as the waste of its

Petitioner Monaghan's Exhibit B (Cont.)

assets, and not until it became widely known that the First National Building & Loan Association, which held the corporate control of the defendant corporation and dominated its affairs, was insolvent, and said suit was not filed until it was apparent to anyone who examined into the affairs of the defendant corporation that it was the only method available of preventing the further dissipation of the assets, misapplication of funds and waste of the fast dwindling remnant of such assets.

XVII.

2,792 CREDITORS AVAIL THEMSELVES OF BENEFITS SECURED.

2,792 creditors of the said defendant corporation elected to accept the above offer and thereby obligated themselves to pay your petitioner a reasonable fee for the services rendered to them by her in said suit to the same extent as if they had signed a written contract to that effect before suit was brought.

XVIII.

LEGAL PROBLEMS AND INVESTIGATION THEREOF.

Your petitioner personally made an intensive study of the law applicable to the facts ascertained by her investigation, and based her complaint upon the theory that the plaintiffs and all those similarly situated were entitled to equitable [50] relief, and prayed for such relief on the following theory:

Petitioner Monaghan's Exhibit B (Cont.)

A federal court has equitable jurisdiction to entertain a class suit when the requisite diversity of citizenship exists and when one of the complainants is a creditor holding a claim in excess of $3000.00, secured by an equitable lien. No state can by statute or otherwise deprive a federal court of its jurisdiction or limit that jurisdictioin in any particular.

The contracts entered into between the defendant corporation and the plaintiffs and those similarly situated, created equitable liens in favor of the latter and created the relation of debtor and creditor between the parties to such contracts. A federal court of equity at the instance of lienholding creditors has jurisdiction to appoint a receiver for the assets of a building and loan association, incorporated in a state other than that in which the court is sitting, when the jurisdictional facts exist and justify the granting of equitable relief, and as an incident thereto the appointment of a receiver when the association is doing business in the state where the court is sitting.

Equal protection of the law is granted to each and every creditor of a corporation regardless of his residence or sitizenship, and no state can by statute give a preference to its own citizens or residents over those of any other state.

When a federal court of equity obtains jurisdiction over a corporation by means of a sufficient bill of complaint and personal service on the corporation, or its authorized agents, such court has the power to compel such corporation to execute deeds and other conveyances to real or personal property in the states

Petitioner Monaghan's Exhibit B (Cont.)

where the property is situated when the property involved is trust property and the conduct of the corporate trustee has been such as to justify its removal and the appointment of a receiver to take possession of its assets.

The police powers of a state do not extend beyond its physical boundaries and state officers as such cannot exercise any of their [51] delegated powers outside of such state except that, where the statutes of that state vest title to the assets of a delinquent corporation in such officer and proper steps have been taken to wind up the affairs of such delinquent corporation, the statutory receiver may be vested with title to the property actually owned by the corporation wherever situated.

The articles of incorporation of the defendant corporation and the statutes of Utah vested said defendant corporation with the power to borrow money and pledge its property to secure the payment of its obligations. The statutes of Utah did not vest its bank commissioner with title to the assets of a defunct building and loan association.

The defendant corporation was insolvent and its liabilities exceeded its assets by more than $400,000.00 (later found to be much greater). Its affairs had been mismanaged by its officers and directors who had wasted its assets for eleven years; had paid dividends amounting to hundreds of thousands of dollars to themselves when the corporation was insolvent, the payments being made from funds rightfully belonging to the complainants and those similarly

Petitioner Monaghan's Exhibit B (Cont.)

situated. Its expenses exceeded its earnings in 1932 by more than $70,000.00. It paid extravagant salaries for nominal services. Its liabilities were falsely stated on its books. It made false statements in its published statements and advertisements in order to obtain money from complainants and those similarly situated. All of its properties were being wasted to such an extent that there would be no funds left to pay anything to complainants and those similarly situated and their claims would be a total loss unless this Court took complete charge of its affairs and salvaged the same for the benefit of its creditors.

With records in his office revealing this state of the corporation's affairs, the Bank Commissioner of Utah permitted the [52] officers and directors of the corporation to mismanage the affairs of the corporation, waste and absorb its assets, misapply its trust funds, obtain fresh loans from the public by false representations as to its financial condition, and took no steps to correct this condition, and although the Bank Commissioner of Utah had accepted the trust to constantly inspect the trust fund which the corporation had agreed to set aside for the protection of the complainants and those similarly situated, he never at any time or at all took steps to protect such fund or the persons who were being defrauded.

The state officers of California, Oregon, Idaho and Wyoming were guilty of a like dereliction of duty in permitting such trust funds to be misapplied and wasted and dissipated, although they made repeated

Petitioner Monaghan's Exhibit B (Cont.)

examinations of the affairs of the corporation, which, if properly conducted, would have revealed the truth.

An imperative necessity existed for the appointment of a received if the complainants and those similarly situated were to recover a single dollar of the money they had loaned to the corporation on the faith of their contracts by which the corporation had agreed to hold these assets in trust subject to the constant examination and inspection of the banking department of the state of Utah to secure such loans, and that no other adequate remedy existed for the protection of these creditors and those similarly situated other than the one pursued in this proceeding.

XIX.

Process was duly issued in said suit and service had upon the defendant, and a restraining order was immediately issued against the defendant restraining the defendant from disposing of the assets of the defendant corporation and from removing, destroying or concealing its books, records, files, documents and other property of the defendant then in the state of Arizona. [53]

XX.

DEFENDANT'S RESISTANCE—ITS THEORIES.

The defendant corporation vigorously resisted the suit of the plaintiffs herein, employing Messrs. Charles B. Ward, R. G. Langmade, Charles L. Rawlins and George H. Rawlins, all outstanding members

Petitioner Monaghan's Exhibit B (Cont.)

of the bar of this court, as their solicitors to defend said suit.

These solicitors filed various dilatory motions in which they sought to have the restraining order modified and vacated and attacked the complaint, particularly upon the ground of lack of jurisdiction of this Court and upon the ground of failure to state sufficient facts to entitle the complainants to any relief.

These solicitors were well versed in federal equity practice and ably presented the contentions of the defendant corporation. They denied the right of this Court to give the necessary protection to these plaintiffs and those similarly situated, not only upon the facts of the case but upon the law as well, and further contended:

That this court had no jurisdiction to appoint a receiver for this corporation; the sole right to liquidate the assets of the corporation was in the Bank Commissioner of the State of Utah, the corporation having been organized under the laws of that state; the appointment of a receiver would be an abuse of discretion by the court and would result in the acceleration of the due date of all mortgages held by it and would thus work a great injustice to the mortgagors; the facts alleged in the bill of complaint did not justify the issuance of a restraining order or an injunction, or the appointment of a receiver; the plaintiffs were not creditors but stockholders; the plaintiffs' contracts did not create a lien in their favor, that plaintiffs were not entitled to withdraw funds or demand the payment of their certificates, basing this

Petitioner Monaghan's Exhibit B (Cont.)

contention on the ground that [54] they had failed and neglected to carry out their contracts with the defendant and that the defendant had kept and performed its contracts with the plaintiffs according to the conditions therein and the by-laws of the Association, which the defendant corporation alleged specifically provided that not more than one-half of the fund received by the association in any one month should be applicable to the payment of withdrawing members and that withdrawals should be paid in rotation according to priority of notice, and that there were other stockholders of the association who had applied prior in time to the filing of the applications of plaintiffs who had not been paid in rotation or whose turn for payment had not been reached for the reason that sufficient funds of the association had not been received applicable to the payment of claims of withdrawing members, and contended further that under the laws of Utah, not more than one-half of the monthly receipts in any one month might be applied to the withdrawals for the month without the consent of the board of directors of the corporation.

The defendant corporation also denied insolvency, mismanagement, waste of assets, and the other material allegations of the complaint.

They supported their contentions by briefs and oral argument of able counsel for defendant.

Petitioner Monaghan's Exhibit B (Cont.)

XXI.

PLAINTIFFS' REPLY TO DEFENDANT'S CONTENTIONS.

Your petitioner and her co-solicitor met the contentions of the defendant by extensive briefs and oral arguments, contending that:

The court had jurisdiction to appoint a receiver of a foreign corporation at the instance of creditors, where fraud and insolvency were involved; the Bank Commissioner of Utah was appointed under the police power of that state and the police power [55] did not extend beyond the territorial jurisdiction of that state.

That the mortgages held by the corporation were straight mortgages and which provided a definite term of payment and were not mortgages of such a character whose due date would be accelerated by the failure of the corporation; the facts alleged, namely insolvency, mismanagement and dissipation of the assets, were sufficient grounds for the relief sought and were fully supported by affidavits of petitioner and James A. Smith, C.P.A., filed in this proceeding.

The plaintiffs were not stockholders but creditors; the contracts created equitable liens and a trust of which the federal courts of equity could and would take jurisdiction; under defendant's construction of the contracts, the obligations to plaintiffs and those similarly situated would never be payable and that such construction would be a fraud upon such creditors.

Petitioner Monaghan's Exhibit B (Cont.)

That the bill of complaint, verified by your petitioner, showing insolvency, and the affidavits of your petitioner and the said James A. Smith, C.P.A. in support thereof, made a prima facie case which could only be refuted by a showing of solvency, the production of the books and records of the corporation and a complete disclosure of the truth of its condition in the pleadings of the defendant corporation.

XXII.

COMMISSIONER MALIA'S ATTEMPTED INTERVENTION.

After various oral arguments and the filing of briefs going to the question of law raised by the motions and demurrers of the defendant, and while the court had the same under consideration, but before the Court had given its decision in the matter, J. A. Malia, then Bank Commissioner of the State of Utah, did, on the 26th day of September, 1933, file a petition for leave to intervene in this proceedings for the purpose of having the books, records and movable assets of the corporation removed to [56] the state of Utah, upon the alleged ground that he could have closer supervision over the affairs of the corporation, he alleging in his motion or petition for leave to intervene, that the defendant corporation had since 1921 conducted a successful building and loan business. This allegation was made notwithstanding the fact that he then had in his possession full information in the records of his office of the insolvency of the corporation and mismanagement of its affairs, and

Petitioner Monaghan's Exhibit B (Cont.)

notwithstanding the fact that he had notice for months previously of the filing of this suit and of the filing of the affidavits in connection therewith which directly called to his attention the true condition of the defendant corporation.

He further alleged that the corporation being an Utah corporation, he was vested with exclusive jurisdiction over the affairs of the defendant to the exclusion of this or any other court, and prayed for an order of this court permitting him to file his complaint in intervention and to be forthwith entered as intervener in said action, and for other and further general relief. The purpose of said intervention was to divest this Court of all control of the assets of the defendant corporation which were then in the constructive possession of this Court, and to remove such assets beyond the jurisdiction of this Court.

Said petition was verified by D. M. Draper, a member of the Bar of the State of Utah, and an assistant attorney general of that state, and he represented said Malia as Bank Commissioner in presenting said petition to the Court.

XXIII.

PLAINTIFFS' SOLICITORS OPPOSE MALIA AND ARE SUSTAINED.

Upon the presentation of the petition of said Malia, your petitioner and her co-solicitor, strongly opposed the same and alleged that there had been no compliance with the federal equity [57] rules governing

Petitioner Monaghan's Exhibit B (Cont.)

intervention, and, among other points, alleging that the jurisdiction of the court in the premises had not been admitted as required by such rule. The Court sustained the position of your petitioner and her co-solicitor, and refused to recognize the intervention by Malia. Thereupon an application was made to the Court to allow Mr. Draper to appear as counsel pro hac vice for the defendant corporation and he then associated himself with the other counsel representing the defendant corporation as one of counsel for the defendant resisting the complaint of the plaintiffs herein. Mr. Draper argued strongly and ably against the right of the court to appoint a receiver, as against the wishes of the Bank Commissioner of Utah. The Court granted Mr. Draper further time to amend his petition or show any right to intervene in the proceedings.

After the hearing on September 26, 1933, to-wit: on October 3, 1933, the solicitors for the plaintiffs filed formal written motions to dismiss the petition of Malia for leave to intervene, supported by points and authorities, and duly served the same upon him, as well as upon the defendant. The Bank Commissioner of Utah did not avail himself of the opportunity granted him by the Court to amend his petition to intervene and on the 3rd day of January, 1934, his petition was dismissed.

XXIV.

After due consideration by the Court on the various briefs and oral arguments made, the Court denied

Petitioner Monaghan's Exhibit B (Cont.)

defendant's motions and overruled their demurrers, thus settling all the law questions. The cause then awaited the convenience of the Court for the purpose of setting a date for the hearing of the cause.

XXV.

SEIZURE OF ASSETS BY MALIA.

This was the situation that existed a few days prior to the 17th day of March, 1934, when the said J. A. Malia, with the con- [58] sent and acquiesence of M. E. Waddoups, took possession of the assets of the defendant corporation in Arizona (which were then in the physical possession of the corporation), notwithstanding the constructive possession of said assets in this Court. A. J. Bruneau, secretary and general-manager of the defendant corporation, protested the seizure of these assets without this Court's consent, but without avail.

Malia also attempted to secure possession of the moneys of the corporation deposited in the Valley National Bank of Phoenix, and the Phoenix National Bank, but each of these institutions refused to turn over possession of such funds to him. Following this refusal, Malia then appeared in the United States District Court and filed an amended petition for leave to intervene, as Bank Commissioner of the state of Utah, on March 23, 1934, seeking to procure an order from this Court disclaiming any right to appoint a receiver or take possession of the assets of the defendant and sought an order that would destroy the force

Petitioner Monaghan's Exhibit B (Cont.)

and effect of the restraining order issued by the Court on April 18, 1933, which was still in effect. He was represented at this time by Messrs. Moore & Shimmel, eminent attorneys of Phoenix.

XXVI.

MALIA'S ALLEGATIONS.

Malia based his right to intervene upon the allegation that he had theretofore, on, to-wit: March 17, 1934, seized the assets of the defendant corporation in Utah and that he had prior to the time of the filing of said petition procured an order from the state district court in Utah authorizing him to take possession of all of the assets of the corporation, and that he claimed title to the assets upon the theory that he was so vested by the terms of the Utah statutes.

XXVII.

PLAINTIFFS' SOLICITORS AGAIN OPPOSE MALIA. [59]

The solicitors for plaintiffs vigorously opposed the contention of the Bank Commissioner of Utah and filed a petition for the immediate appointment of a receiver and procured an order to show cause thereon. They alleged that said Malia had failed, neglected and refused theretofore to take action to protect the investors in said Association, although he was fully informed, or by reasonable diligence could have been informed, of the unsafe and unsound condition of the defendant corporation, and that with all this in-

Petitioner Monaghan's Exhibit B (Cont.)

formation before him, he did on the 26th day of September, 1933, assert in a written pleading filed in this court that the defendant corporation "since 1921 has conducted a successful building and loan business throughout the several states of the Union under the supervision of the Bank Commissioner of the state of Utah", and your petitioner and her co-solicitor also alleged that from the records and files in the cause it appeared that the Bank Commissioner of the State of Utah had been negligent in his supervision of the affairs of the corporation, lacked the qualities necessary to a proper administration of its affairs and had for a long period of time suffered said corporation to continue business in an unsafe and unsound condition when he had access to their records and could have by the use of ordinary diligence discovered the condition of its affairs.

The defendant corporation and Malia filed answer and objections to this petition of plaintiffs for the immediate appointment of a receiver, and strenuously fought the granting of the petition in the premises. In these proceedings Malia was further represented by two members of the Bar of Salt Lake City Messrs. H. Van Dam and H. L. Mulliner, in addition to said Messrs. Moore & Shimmel.

XXVIII.

PETITION OF PLAINTIFFS GRANTED. [60]

These issues were heard by the Court on the 10th day of April, 1934, at which time evidence was intro-

Petitioner Monaghan's Exhibit B (Cont.)

duced and exhaustive arguments made, and from the bench the Court made the following order:

> "I will enter an order of record in this case at this time directing Mr. Malia to leave all the papers and files and the property of the Building and Loan Association in the state of Arizona and not remove them. That goes to all assets, books, records, files, money and everything else that belongs to this association; that they do not be removed from this state. That order is in effect until this matter is disposed of or until further order of the Court."

The cause was ordered submitted on briefs, and your petitioner and her co-solicitor were directed to prepare a brief upon the particular point involved as to the rights of the Bank Commissioner of Utah in the premises. This was the first occasion in the history of law, so far as your petitioner is informed, in which the question of the unfitness of a state official to administer the assets of a delinquent corporation had been raised as a ground for the appointment of a receiver, and proved an important question in the subsequent conduct of the litigation.

On the 20th day of April, 1934, the Court granted the petition of the plaintiffs for the appointment of a receiver pendente lite, appointing Hon. Henry S. McCluskey as such receiver and continued in force the injunction and restraining order theretofore entered by it. The Receiver qualified on the date of his appointment and demanded possession of the assets, but his demand was refused.

Petitioner Monaghan's Exhibit B (Cont.)

XXIX.

DEFENDANT CORPORATION AND MALIA APPEAL TO CIRCUIT COURT OF APPEALS.

That immediately upon the entering of the interlocutory decree appointing Henry S. McCluskey, Receiver, notice of appeal was given by the defendant corporation and J. A. Malia, Bank Commissioner of Utah. This appeal was granted by the court and supersedeas bond fixed in the sum of $35,000.00. James R. [61] Moore, solicitor for the proposed appellants, together with your petitioner's co-solicitor, then appeared before the Honorable Fred C. Jacobs, the Judge who tried the cause, and settled the statement of evidence and the appeal was duly perfected.

XXX.

PROCEEDINGS ON APPEAL.

In June of 1934, and before the case was at issue in the Circuit Court of Appeals, the defendant corporation filed a motion for modification of the injunctive order made by this Court, and also filed a brief therewith. This was opposed by your petitioner and her co-solicitor, who filed an answer and brief thereto. The Circuit Court of Appeals denied this motion of the defendant corporation.

The appellants filed their brief on appeal in due season contending that the appellees were stockholders (the certificates labeled them as such); that the bill of complaint was without equity; that the court abused its discretion in appointing a receiver; that

Petitioner Monaghan's Exhibit B (Cont.)

the appellees had no lien upon the assets of the corporation; that the Bank Commissioner of Utah was the statutory liquidator and vested with title to the Association's assets, and that under the full faith and credit clause of the Constitution, the court was bound to recognize the title of the Bank Commissioner of Utah to the assets of the corporation; that the court will not appoint a receiver at the suit of an unsecured, nonjudgment creditor, and that the court should not interfere with the internal affairs of a foreign corporation.

Your petitioner and her co-solicitor filed their answering brief thereto within the time required by law, contending:

That the labeling of the certificate as stock did not make it such, and the instrument itself created the relation of debtor and creditor between the contracting parties; that the facts stated in the complaint showed appellees' right to equitable [62] relief and that they were holding equitable liens and that the defendant was false to its trust; that the facts presented to the court by the verified petition of plaintiff, and otherwise, were such as to require it to grant the injunctive relief and appoint a receiver; that the contracts between appellants and appellees created equitable liens in favor of appellees and the assets of the corporation were a trust fund to secure the repayment of the money borrowed from the appellees and those similarly situated; that the Bank Commissioner of Utah was not vested with title to the assets of the corporation; that the appointment

Petitioner Monaghan's Exhibit B (Cont.)

of a receiver is an ancillary remedy which a federal court of equity will grant to a lienholding creditor in a proper case; that the appellees and those similarly situated being creditors and not stockholders, the issue was not one of internal management but the right of creditors to prevent the waste of a trust fund; that Malia had no rights in the premises, but if ever he had any he had lost same by his negligence and failure to protect the rights of all lienholding creditors, he having ample information in his own office of the wrongful conduct of the defendant corporation and its insolvency.

While this matter was at issue in the Circuit Court of Appeals the Supreme Court of the United States on the 4th day of February, 1935, handed down four decisions involving the rights of statutory liquidators, and the appellants thereupon filed a supplemental brief in the Circuit Court of Appeals based on the theory that these decisions required a reversal of the decree rendered in the District Court. In opposition to this contention your petitioner and her co-solicitor filed their supplemental brief.

XXXI.

CIRCUIT COURT OF APPEALS SUSTAINS PETITIONER.

The cause was argued at San Francisco on the 28th day of [63] February, 1935, by petitioner's co-solicitor; your petitioner being present in court and assisting on that occasion.

Petitioner Monaghan's Exhibit B (Cont.)

The matter was taken under advisement, and on the 5th day of August, 1935, the Circuit Court of Appeals rendered its decision in which it affirmed the interlocutory decree of the United States District Court appointing Henry S. McCluskey as receiver and issuing an injunction pertaining to the assets of the corporation, and in its opinion the Circuit Court of Appeals said the Court below "might well have arrived at the conclusion that the corporate chaos had been a matter of years, rather than months, and that therefore the Bank Commissioner of Utah in whose office admittedly there were filed reports containing 'full information as to the status of the defendant corporation', had shown himself not to be a proper person to husband the dwindling assets of the failing Association."

The appellants thereupon filed a motion for the purpose of having certain papers in the District Court sent up to the Circuit Court of Appeals, which motion was opposed by your petitioner and her co-solicitor, and the certiorari therefor was subsequently denied.

XXXII.

PLAINTIFFS' SOLICITORS SUSTAINED IN UNITED STATE SUPREME COURT.

The appellants then filed their motion for rehearing and this was also denied, and they thereupon filed their petition for a writ of certiorari in the Supreme Court of the United States and their briefs thereon, in which they made the contentions that the

Petitioner Monaghan's Exhibit B (Cont.)

Circuit Court of Appeals had denied full faith and credit to the statutes of Utah and decided a federal question in conflict with the decision of the United States Supreme Court in the case of Clark v. Williard, 292 U.S. 112 and 294 U.S. 211; and that in affirming the decision of the District Court appoint-
[64] ing a receiver and displacing the Bank Commissioner of Utah, its decision was contrary to the four decisions hereinbefore mentioned which involved the rights of statutory liquidators and which had been rendered while this case was at issue in the Circuit Court of Appeals.

Your petitioner and her co-solicitor filed their opposing brief, centending that the decision of the Circuit Court of Appeals was not in conflict with the cases cited; that no public question or other question of public importance which had not theretofore been settled by the Supreme Court was involved, and that there was no departure from the accepted and usual course of judicial proceedings in the court's decree.

The petition for a writ of certiorari was denied by the United States Supreme Court on November 11, 1935.

XXXIII.

TRIAL AND FINAL DECREE.

On the 29th day of September, 1936, the suit was tried upon the merits, your petitioner and her co-solicitor appearing for the plaintiffs, and James R. Moore, Esq., of the law firm of Moore & Shimmel appearing for the defendant, and after hearing the

Petitioner Monaghan's Exhibit B (Cont.)

evidence the Court directed that findings of fact and conclusions of law be prepared by counsel for plaintiffs and that decree be entered for the plaintiffs.

On, to-wit: the 5th day of January, 1937, the District Court for the District of Arizona made its decree in which it, among other things, established the liens of the creditors, affirmed the appointment of Henry S. McCluskey as receiver, and made the injunction theretofore rendered, permanent; thereby establishing the rights of said lienholding creditors who desired to come in and obtain the benefits of the judgment upon the conditions named in the invitation contained in the complaint, namely, that they should bear their proportionate share of the [65] expense of the litigation, which included the attorneys' fees herein petitioned for.

Further, said decree secured the trust fund wherever situated to the plaintiffs in this suit and those similarly situated, said decree providing and ordering that deeds and other conveyances to the property of the corporation wherever situated should be executed by the corporation to the receiver as trustee for the benefit of all these parties, said decree having been obtained after personal service and appearance by the corporation; this provision was made for the reason that a receiver appointed by an United States court is not vested with title, but such court has power to compel the defendant to execute deeds and conveyances to its property wherever situated when the same is trust property. Such decree is binding upon all situated similarly to the named plaintiffs, regardless of any active participation in the suit.

Petitioner Monaghan's Exhibit B (Cont.)

XXXIV.

INTERVENTION.

In accordance with the invitation contained in the complaint, other creditors similarly situated to plaintiffs in this action employed their own attorneys, and Messrs. O'Sullivan and Morgan, of Prescott, Arizona, filed a motion for leave to intervene in these proceedings as plaintiffs. The court granted this leave to intervene, solicitors for plaintiffs acquiescing in the granting of the motion to intervene. However, they never filed a complaint in the proceedings or took other action therein.

H. C. Smoot and Sophia Smoot, through their solicitor E. O. Phlegar, filed a motion for leave to intervene, solicitors for plaintiffs acquiescing thereing. Their motion was granted and bill of complaint was filed therein by Mr. Phlegar on behalf of his clients. He appeared in subsequent proceedings up to the termination thereof in the United States District Court, but [66] subsequently withdrew and took no part in the appeal or the proceedings in the United State Supreme Court.

XXXV.

LABOR INVOLVED—OBSTACLES INTERPOSED.

Practically all of the detail work incident to the litigation herein described and the other proceedings in connection with the recovery and preservation of the trust funds herein mentioned, were performed by

Petitioner Monaghan's Exhibit B (Cont.)

this petitioner, as well as a large part of the investigations and research work necessary to the successful conduct of such litigation.

The labor of your petitioner was arduous and difficult, the results of the litigation by no means certain, and the hazard of success great.

Your petitioner and her co-solicitor had great difficulty in procuring the evidence to establish the facts for the reason that the books and records were in the exclusive possession of the officers, directors and employees of the defendant corporation, who, as well as their attorneys, refused access thereto to your petitioner and her co-solicitor, and were hostile to plaintiffs. It thus became necessary for your petitioner and her co-solicitor to obtain their information from indirect sources.

Petitioner personally made examinations of the records in the state of Arizona, of the Arizona Corporation Commission; of the Superintendent of Banks; of the State Treasurer, of the County Recorder and of the County Treasurer and County Assessor, to ascertain so far as possible all matters pertaining to the affairs of the association; petitioner personally checked all records of the association in the offices of the County Recorder and County Clerk and of the Bank Commissioner, in Salt Lake City, Utah, and of the suit instituted by J. A. Malia in the District Court of Sale Lake County, seeking the liquidation and suspension of the association in Utah.

Petitioner Monaghan's Exhibit B (Cont.)

Petitioner personally made investigation into the records [67] of the state courts in foreclosure proceedings and other litigation in which the defendant corporation was involved. Petitioner had interviews with other attorneys who had claims against the defendant and allied corporations, and many interviews and consultations with her clients; that she procured newspaper and advertising matter and printed statements of the corporation as far as they could be obtained by diligent search.

Your petitioner personally attended the trials in the Superior Court in and for the County of Maricopa, in actions brought against the First National Building & Loan Assoication, which held the corporate control of the defendant herein, and against the Intermountain Building & Loan Association of Arizona, both corporations belonging to the so-called Intermountain Group. Many admissions were made by the defendants in these two mentioned suits, and valuable information was secured by your petitioner and these hearings assisted her in obtaining the evidence necessary to establish the allegations of the plaintiff's complaint in this suit. These trials each lasted several weeks, and receivers were appointed.

Your petitioner and her co-solicitor had interviews with representatives of the federal government who had come to the office of petitioner's co-solicitor in search of evidence against said M. E. Waddoups, and who in turn furnished your petitioner and her co-solicitor with valuable information.

Your petitioner sought the services of her sister,

Petitioner Monaghan's Exhibit B (Cont.)

Kathleen E. Nelligan, of Salt Lake City, Utah, to obtain from the office of the Bank Commissioner of the State of Utah, copies of all reports filed by the defendant corporation annually from the year 1921 up to and including the last report filed, which was for the year 1932. The said Kathleen E. Nelligan, together with one Gertrude Casto, proceeded to and did obtain all of said copies for petitioner, and both the said Kathleen E. Nelligan and Gertrude Casto made affidavit as to the correctness of said copies. The defendant [68] corporation later by affidavit admitted that such copies were true and correct copies of the reports filed by it. After consultations with petitioner's co-solicitor and with James A. Smith, a certified public accountant, of Phoenix, Arizona, as hereinafter more fully set forth, and after a thorough personal examination of said reports, your petitioner broke down and analyzed said reports for the purpose of obtaining the evidence therefrom to establish the insolvency of the corporation material to the controversy, and to establish the fraud and mismanagement of its directors, as well as the negligence of the Bank Commissioner of Utah in permitting the corporation to do business when by the reports on file in his office and an examination of the affairs of the corporation, he knew, or could have known, by the use of ordinary diligence, the insolvency of said corporation; that from said analysis and break-down of said reports, petitioner personally prepared a schedule showing the insolvency of said corporation year by year, and provided

Petitioner Monaghan's Exhibit B (Cont.)

proof of the insolvency of the defendant corporation and the misconduct of its officers, and, as stated by petitioner's co-solicitor in his petition, was a "time consuming and laborious process." Petitioner spent many, many weeks on this schedule alone. After your petitioner had prepared this schedule, it was checked by said James A. Smith, C.P.A. as aforesaid, and found to be correct. The affidavits of Elizabeth G. Monaghan and James A. Smith, attached to the bill of complaint, were based on this schedule made by petitioner.

Petitioner's brother-in-law, S. A. Nelligan, of Salt Lake City, Utah, obtained for petitioner and her co-solicitor, the records of the suit filed by Daniel Alexander against M. E. Waddoups, hereinbefore mentioned, in which was disclosed the secret contract under which the unlawful commissioners of the amount of several hundred thousand dollars had been unlawfully paid to the said M. E. Waddoups.

[69]

Petitioner personally attended the taking of the depositions of M. E. Waddoups and A. J. Bruneau, the examinations being conducted by Hon. Joseph H. Morgan, of the law firm of O'Sullivan and Morgan, Prescott, Arizona, attorneys for the plaintiffs in the suit against the First National Building and Loan Association, hereinabove referred to. In said depositions admissions were made of the excessive commissions paid to said M. E. Waddoups and others, ranging from three to seven per cent.

Petitioner personally secured an affidavit from one

Petitioner Monaghan's Exhibit B (Cont.)

George Field, a former salesman for said association, showing the commission paid to agents selling the certificates of the association.

Petitioner sought and secured information from each and every county in the states of Arizona and Utah, pertaining to the property of the association.

Petitioner and her co-solicitor made examinations of the statutes of Utah, and such examinations disclosed that corporations similar in nature to the defendant were required to file verified annual statements with the Bank Commissioner of the State of Utah and that it was the duty of the Bank Commissioner of Utah to make periodical examinations of the affairs of such corporations.

Your petitioner, her co-solicitor and said James A. Smith, were of the opinion that the defendant could not file such reports for a period of eleven years without revealing the true condition of the corporation, and that a break-down of such reports would necessarily reveal, when taken in connection with other evidence existing and available, that the corporation was and had been insolvent for years; that its expenses had exceeded its income for many years and that these statements would reveal the misconduct of the officers and directors of the defendant, as well as the mismanagement of its affairs and waste of its assets. [70]

The very nature of this suit of necessity required the assistance of an expert accountant, and your petitioner was fortunate in obtaining the assistance of James A. Smith, a certified public accountant of

Petitioner Monaghan's Exhibit B (Cont.)

Phoenix, Arizona, and member of the W. H. Plunkett Audit Company, who was familiar with accounting in all its branches, including building and loan associations.

The work performed and advice given by Mr. Smith was invaluable to petitioner and her co-solicitor. In consideration of the services to be rendered by the said James A. Smith, your petitioner agreed that if she were successful in this suit, she would petition the Honorable Court for a reasonable compensation to him.

The said James A. Smith has submitted to your petitioner a memorandum of the work which he performed, together with a statement of what he believes to be reasonable compensation therefor, which memorandum is attached hereto as Exhibit "A", hereby referred to and made a part hereof. Petitioner believes that the sum of $10,000.00 is a reasonable sum to be allowed said accountant.

The contracts between the defendant corporation and its creditors, when examined by your petitioner, her co-solicitor and James A. Smith, disclosed that the corporation was promising to pay such creditors interest at the rate of 8.84% per annum. The commissions of from three to seven percent paid to said Waddoups and others, for obtaining the funds represented by these contracts, ran the total cost of the money borrowed to the sum of $67.40 per year, for an average of five years, for each $663.00 received by said association, or a fraction more than 10%. Since the evidence disclosed that the bulk of the

Petitioner Monaghan's Exhibit B (Cont.)

loans made by the association to certificate holders and others, in Arizona at least, returned to the association only 8% interest, the result was that the total income from the association's loans was not [71] sufficient to pay the interest which it had guaranteed to the creditors, and in addition to this deficit, there was no income with which to pay expenses of doing business, and the corporation was becoming further insolvent each year to the full extent of the expenses incurred by it, plus its losses on investments.

In order to prove these facts it was necessary not only to have the records mentioned from the office of the Bank Commissioner of Utah, together with the supporting affidavits, but also the outside evidence and affidavits showing the excess cost.

As a result of the consultations with and the work of said James A. Smith, and the analysis and breakdown of such reports by your petitioner, in connection with other evidence assembled by the solicitors for the plaintiffs, sufficient evidence was procured to establish a prima facie case to obtain the relief prayed for in petitioner's bill of complaint.

As the facts involved were many and not susceptible of proof by "demonstrable evidence" this case comes within the definition of hazardous cases (upon the facts), as the rule is set forth in the case of United States vs. Equitable Trust Co., 283 U.S. 738; 75 L. ed. 1379.

Petitioner Monaghan's Exhibit B (Cont.)

XXXVI.

NOVEL LAW QUESTIONS INVOLVED.

By reason of the fact that many novel questions of law were involved, it was necessary for your petitioner and her co-solicitor to make an exhaustive study of the applicable principles of the law and of the authorities which would sustain those principles upon a hearing in court to prove to the court the right of the plaintiffs to the relief they sought.

It was also necessary to make an exhaustive study of the statutes of Utah to ascertain whether there was anything in those statutes, which as a matter of public policy of that state [72] would render contracts of the nature of plaintiffs' and those similarly situated, void in so far as they attempted to create a lien, and this investigation enabled your petitioner and her co-solicitor to establish to the satisfaction of the various courts the validity of these liens.

Much study was necessary also to an interpretation of the statute laws of California, Oregon, Idaho and Wyoming, in which states this corporation was doing business.

Novel and difficult questions of law were involved in this litigation, questions that had not been definitely determined until the decision of the Supreme Court in this case, and properly to present these questions and overcome the contentions of the defendant corporation in opposition thereto necessitated an immence amount of research work. The applicable principles of law had not at the time your

Petitioner Monaghan's Exhibit B (Cont.)

petitioner filed the complaint herein, been determined by the Supreme Court of the United States nor by any of the federal courts of appeal and were therefore uncertain.

The contention of your petitioner and her co-solicitor that the United States Court had a right to appoint a receiver of a building and loan association where the statutes at the domicile of the corporation provided for liquidation by a state officer, when the state official had shown himself unfit to administer the affairs of the delinquent corporation and when the statutes under which he was appointed were inadequate to give this protection to litigants, was a question raised for the first time in the annals of the law so far as your petitioner is aware, and was upheld by the Circuit Court of Appeals, and, also, for the first time, that right was definitely settled and that principle established by the denial of the writ of certiorari by the Supreme Court of the United States.

The contention of your petitioner and her co-solicitor that [73] the relation of debtor and creditor was created by the particular contracts and that a trust and lien was created as against the building and loan association on behalf of the holders of the certificates, also raised for the first time, was established definitely, and in its decision the Circuit Court of Appeals definitely held that despite the label attached to the certificates, the instruments were not stock, but created the relation of debtor and creditor, and that the language of the contract was sufficient

Petitioner Monaghan's Exhibit B (Cont.)

to create an equitable lien in favor of such creditor; this also being established for the first time.

Although prior to this time it had been established that a building and loan association could borrow money and issue its promise to pay in the form of investment certificates, it had not been held that a building and loan association could pledge or mortgage its assets for the purpose of securing loans so obtained, until the final decision in this case.

Another novel question involved the force and effect of a statute of the state under which a corporation was organized when that state permitted a building and loan association to remove its principal office to another state and to carry on its business in the foreign jurisdiction.

In the course of her research work, your petitioner examined and analyzed more than a thousand cases bearing on the various issues involved, as well as the statutes of the various states and many text books. This extensive research was necessary by reason of the numerous questions of law involved. This case therefore comes within the definition of a hazardous case in regard to the law as set forth in U.S. vs. Equitable Trust Co. supra.

XXXVII.

PETITIONER'S WORK.

The major portion of the time of your petitioner for a period of more than three and one-half years was devoted to labor [74] for and on behalf of the

Petitioner Monaghan's Exhibit B (Cont.)

plaintiffs and those similarly situated in the investigation of this cause, the study of the principles of law governing the case, the analysis of the facts involved and the establishing of evidence to support the allegations of the complaint, the assisting in the preparation of all pleadings and briefs in the case, as well as the editing, revising and correcting of all such pleadings and briefs, obtaining the various orders and decrees in this sut, defending the decree of the lower court in the Circuit Court of Appeals and the Supreme Court of the United States, the preparation as to the law and facts necessary to a successful conclusion of the case, as well as the time spent in preparation, research work, examinations of the records in the offices of the Arizona Corporation Commission, the Superintendent of Banks, the State Treasurer, the County Recorder, the County Treasurer, County Assessor and the office of the Clerk of the Court of Maricopa County; the trip to Salt Lake City, Utah, for the purpose of examining the records pertaining to the corporation in the offices of the County Recorder, the County Clerk, the Bank Commissioner of Utah, and the Clerk of the District Court; the attendance at the taking of the depositions of M. E. Waddoups and A. J. Bruneau; the attendance at the trials in the Superior Court in and for the County of Maricopa; attendance at all hearnigs involving this suit before the United States District Court, as shown by the records, and the Circuit Court of Appeals at San Francisco, California; examination of the statutes of other states,

Petitioner Monaghan's Exhibit B (Cont.)

conference with attorneys for the defendant and the Bank Commissioner of Utah, conferences with attorneys representing particular creditors, including attorneys for the intervenors; conferences and consultations with the plaintiffs, and other clients of petitioner holding claims against the defendant, and various creditors of the defendant corporation; consultations and conferences too [75] numerous to count, with petitioner's co-solicitor and with James A. Smith, C.P.A. That not only did your petitioner give her time and labor during the days, but also the majority of the evenings, Sundays and holidays, during the entire three and one-half year period.

Petitioner states that the necessary work personally performed by her consumed conservatively not less than two and one-half years of continuous legal work.

XXXVIII.

ASSETS RECOVERED FOR BENEFIT OF CREDITORS.

On to-wit, the 30th day of November, 1935, Rulon F. Starley, who had succeeded J. A. Malia as Bank Commissioner of Utah, turned over to Henry S. McCluskey, Receiver appointed by this court as aforesaid, the physical possession of the assets in Arizona, as well as the books and records of the corporation in Arizona. These assets amounted to the gross sum of $1,597,841.89, and are now in possession of Harry W. Hill, Esq., who succeeded Mr. McCluskey as receiver on April 1, 1937.

Petitioner Monaghan's Exhibit B (Cont.)

The Receiver having been primarily appointed by this Court, and decree having been obtained requiring the conveyance of title, such decree would have to be recognized in other states where the defendant had property. As a result thereof, this suit established the rights of these creditors in the property wherever situated and is res adjudicata of all questions involved in the proceedings, and is binding on all those similarly situated to the plaintiffs in this suit, regardless of whether they became active participants in the litigation in this court.

By the decree of this Court it was established that the Receiver appointed by this court was the owner, as trustee, for the benefit of the creditors of said defendant corporation, of gross assets of the defendant corporation in states other than Arizona, of $1,135,229.34. [76]

Subsequent to the 30th day of November, 1935, physical possession of the assets of the defendant in the states of Utah, Idaho and Wyoming were delivered to ancillary receivers appointed in aid of the primary receivership in this Court, and are now being so administered. The rights of the plaintiffs and those similarly situated established by the decree of this court, has not yet been recognized by officials in the states of California and Oregon.

The total gross assets thus passing into the hands of the receiver as trustee for the plaintiffs and those similarly situated is $2,733,071.23.

In addition, there are choses in action against

Petitioner Monaghan's Exhibit B (Cont.)

said M. E. Waddoups and other directors and officers of the defendant corporation from which should be realized a further sum of, to-wit: $100,000.00, your petitioner and her co-solicitor having laid the foundation for this suit.

Your petitioner and her co-solicitor also laid the foundation for the suit against the Bonding Company bonding the officers for unlawful conduct of the officers and directors of said corporation, there having been a fidelity bond issued for that purpose, the liability of said bond exceeding the sum of $50,000.00.

The solicitors for the plaintiffs also laid the foundation for a suit against Waddoups for the sequestration of his property, which suit is now pending in the Superior Court of Arizona, in and for the County of Maricopa, and your petitioner and her co-solicitor also laid the foundation for a judgment subsequently obtained against M. E. Waddoups and others and by which there was secured a lien upon certain of properties held by him in the state of Arizona.

Had it not been for the services rendered by your petitioner and her co-solicitor, all of the assets of the defendant corporation would have been dissipated by the defendant corporation, [77] its officers and directors, as shown by the record in this suit.

Petitioner Monaghan's Exhibit B (Cont.)

XXXIX.

NO COMPENSATION RECEIVED BY PETITIONER.

No contract or understanding now exists or was ever made or existed between your petitioner and the plaintiffs or others similarly situated for compensation for her services, other than the agreement that in the event of a successful termination of the litigation she would accept a reasonable compensation to be allowed by the Court, the same to be paid from the assets coming into the hands of the receiver of the defendant corporation, should a receiver be appointed by this Court.

When petitioner associated with her the said Thomas W. Nealon to assist her in this litigation, it was agreed that whatever allowance was received as compensation would be divided equally between the petitioner and her co-solicitor, the said Thomas W. Nealon.

The prevailing rates of compensation in this community to attorneys in cases where the fees are contingent on recovery range from twenty to thirty-five percent of recovery, depending on difficulty of proof and hazard involved. Such is the rate of compensation these 2792 creditors who accepted the benefits of said decree would probably have had to pay had they contracted individually for such services as were rendered by the solicitors for the plaintiffs in this cause.

No application has heretofore been made by

Petitioner Monaghan's Exhibit B (Cont.)

your petitioner for compensation for the services rendered to the plaintiffs or those similarly situated for the bringing of suit, or for the services rendered by your petitioner as described in this petition.

XL.

EXPENSES INCURRED

All of the preliminary expenses incurred in the investigation, preparation and trial of said suit up to the time of the [78] appointment of the receiver, and expenses incurred subsequent thereto, with the exception of the printing of the briefs, the expenses for stenographic services set up by petitioner's co-solicitor and his trip to San Francisco, as well as sundry expenses borne by petitioner's co-solicitor subequent to the appointment of the receiver in the sum of $26.82, was borne by your petitioner either directly or by reimbursement to her co-solicitor. In the petition of your petitioner's co-solicitor he has itemized various expenses and asks to be reimbursed. Among said items of expenses were listed those paid by this petitioner or for which she had reimbursed her co-solicitor, and she believes that her co-solicitor will reimburse her for the amount of the expenses so borne by her, and petitioner will not again set up said items.

In addition to the above, the following expenses were incurred by your petitioner, totaling the sum of $301.65, for which she seeks reimbursement:

Petitioner Monaghan's Exhibit B (Cont.)

Travel, hotel, meals, etc. trips Prescott to Phoenix and return	$175.00
Railroad fare and expenses to Salt Lake	67.20
Railroad fare and expenses to San Francisco	59.45
Total	$301.65

Wherefore, your petitioner prays that this Honorable Court allow to your petitioner and her co-solicitor a just and reasonable compensation for their services rendered in connection with the preparation, institution and trial of said cause, including the services rendered by them on the appeal from the interlocutory decree rendered herein to the Ninth Circuit Court of Appeals and for their services in opposing the petition of the defendant corporation and J. A. Malia to the Supreme Court of the United States for a writ of certiorari to review the proceedings in the District Court and Circuit Court of Appeals, [79] such allowance to be for all legal services rendered by the solicitors for the plaintiffs in the premises.

Your petitioner further prays that she be allowed the additional sum of $401.65, for expenses necessarily incurred by her in the premises as hereinbefore set forth.

Your petitioner further prays that she be allowed the additional sum of $10,000.00, or such other sum as the court may deem just and rea-

Petitioner Monaghan's Exhibit B (Cont.)

sonable, for the expense for which she and her co-solicitor necessarily became obligated to the said James A. Smith, C.P.A.

Your petitioner further prays that this Court establish and fix a lien upon the assets now in the hands of the Receiver of the Intermountain Building and Loan Association, an Utah corporation, for the just and reasonable allowance to your petitioner and her co-solicitor upon the foregoing petition and the petition of petitioner's co-solicitor heretofore filed, for services rendered and expenses incurred and expenses for which they became obligated and further prays that said Receiver be authorized and directed to pay the amount of such allowance to your petitioner and her co-solicitor, and to pay the expenses, as aforesaid, from the funds of the receivership estate now in his possession, and that each of the 2792 creditors of said Association who have elected to accept the benefits of the efforts of petitioner and her co-solicitor bear their proportion of such allowance and expenses.

ELIZABETH G. MONAGHAN
Petitioner [80]

State of Arizona,
County of Yavapai—ss.

Elizabeth G. Monaghan, being first duly sworn on oath, deposes and says: That she is the petitioner above named; that she has read the fore-

Petitioner Monaghan's Exhibit B (Cont.)

going petition, knows the contents thereof, and that the same is true, in substance and in fact.

ELIZABETH G. MONAGHAN

Subscribed and Sworn to before me this 15th day of November, 1937.

[Seal] BETTY JANE McDONNELL
Notary Public

My commission expires: October 31, 1939. [81]

Willis H. Plunkett
C.P.A. Arizona 1919
James A. Smith
C.P.A. Arizona 1927

Members of
American Institute of
Accountants
American Society of C.P.A.
Arizona Society of Public
Accountants

The W. H. Plunkett Audit Co.
Analytical & Constructive Accounting
Six Hundred Twelve Luhrs Tower
Phoeniz, Arizona
November 12, 1937.

EXHIBIT "A"

To:
Elizabeth G. Monaghan
and
Thomas W. Nealon
Attorneys
Luhrs Tower
Phoenix, Arizona.

Petitioner Monaghan's Exhibit B (Cont.)

Memorandum in Re:
Intermountain Building & Loan Association
of Utah
Original Suit.

This resume of services is presented with relation to the original suit against the above corporation for the recovery of assets on behalf of creditors.

I was first employed by you, entering immediately upon the necessary work involved, in the early part of 1932. Thereafter, the services performed followed the requirements of the case, often consisting of several consecutive days' work and at other times being of such terms as were necessary.

The full facilities of my office, including the use by you of many texts and treatises on the accounting matters involved, were placed at your disposal.

The work involved and the extent of the service rendered is, of course, familiar to you; but as a means of supplying you with the information so that you may present it for consideration in making your prayer for compensation allowance, it is herein briefly outlined as follows:

1. From the inception of the case, conferences were held frequently, sometimes lasting a few minutes and from that, running into several hours. Much of the time spent in conference was on nights and Sundays.

Petitioner Monaghan's Exhibit B (Cont.)

2. A large volume of accounting work was performed in preparing analyses of financial statements filed by the Association from 1920 to 1932 inclusive; preparation of tables of possible earnings for the period; checking of details with comparisons of financial statements by periods for the purpose of showing insolvency; preparation of insolvency data to show both the period and extent of such insolvency; setting up of proper actuarial tables for certi- [82] (a) ficate values to show the difference between stated values and actuarial increase in value for the purpose of explaining interest rate as cost of money to Association; compilation of statistics taken from various reports of the Association; compliation to show fraudulent manipulation of expense and income accounts; and various other presentations of accounting data pertaining to the case.

3. All hearings in State Courts, whether in relation to one or all of the various associations known as the Intermountain Group, were attended. This was done for the purpose of ascertaining and tabulating information which might be brought out in testimony which might in any way have a bearing upon the instant case. The attendance at court involved many days of work and study which were followed by conferences for the purpose of searching out salient points of interest or attack.

4. Preparation of affidavits as to solvency.

5. Reading of transcripts of testimony adduced at the various hearings of this particular case as

Petitioner Monaghan's Exhibit B (Cont.)

well as those of the other Intermountain cases.

6. Attendance at all hearings and at the trial of the present case. At these times I was always present at your counsel table for the purpose of assisting you in the presentation of evidence and in the cross-examination of adverse witnesses.

7. Presentation of my testimony in the trial whereby the results of the long months of our efforts were crystalized by the statement to the Court conveying my conclusions and findings of fact.

8. Assisting you in your briefing of the case by reading and study of the points stressed and by breaking down the testimony of adverse witnesses to show the vulnerable parts which, in my opinion, strengthened our case when given proper emphasis in your briefs.

All of this varied service and assistance consumed large [83] (b) amounts of time at varying seasons and over a period of many months.

Each accounting phase accomplished, new fields presented themselves and these in turn were made subjects of further endeavor. Progress was necessarily slow since we often lacked much of the picture which could only be filled in by the use of judgment and conclusion until the correct premise was obtained.

Great patience and diligence was required and the hazard of being unable to arrive at a sound conclusion was ever present, thus rendering my task more difficult.

Other accountants, many persons of vast expe-

Petitioner Monaghan's Exhibit B (Cont.)

rience and intimate knowledge of the Association affairs, were arrayed against us. Their testimony was bolstered one by the other, whereas my evidence and testimony was to all intents and purposes the key to the entire evidential side of our case.

A brilliant array of adverse counsel fought savagely every statement I made and took every opportunity to berate and harass me, even questioning my knowledge, ability and integrity before the Court, until the Court acknowledged the attack by referring to the cognizance the Court had taken of my work before him on many occasions theretofore.

In a case of this nature, as in all equity cases where an accounting is requisite, the work of the accountant is inseparably linked to that of the attorneys, and the fruits of victory are, in part, his to be enjoyed.

The value of the work I performed must lie in the success which was achieved by us acting together. The reliance placed upon my efforts was readily shown by the language of the Circuit Court when that Court placed emphasis upon the affidavit of mine and the testimony thereafter adduced.

This work was all performed upon a contingent basis. The possibility of losing the case was taken into consideration [84] (c) from the beginning. It was my understanding that if the case were successful you would make application to the Court

Petitioner Monaghan's Exhibit B (Cont.)

for a reasonable compensation for my services, and that otherwise, in the event the suit were lost, I would receive nothing.

Because of the great amount of actual time spent in the physical labor of preparation, my labor as an expert has a real and tangible value. The period of time that has elapsed without recompense has naturally weighed somewhat heavily upon me. The hazard of success, the extreme contingency of the outcome of the case, the mental strain of hours on the witness stand, no less than the success of the effort, has made these services so unstintingly rendered to you, worthy of a just and valuable compensation.

Inasmuch as the suit was successfully prosecuted and the decision was favorably rendered, the conditions under which my service was performed have been fulfilled and I am, therefore, asking that you make your petition to the Court for an allowance for the services rendered.

Upon the foregoing statements and the conditions of our agreement, I herewith submit a statement for my services which I value conservatively at Ten Thousand ($10,000.00) Dollars.

Respectfully,

(Signed) JAMES A. SMITH

Certified Public Accountant,
Member of the W. H. Plunkett Audit Company. [85] (d)

Petitioner Monaghan's Exhibit B (Cont.)

To

E. G. Monaghan and Thomas W. Nealon,
Attorneys, in the matter of
The Intermountain Building & Loan Association of Utah.

In Account with

James A. Smith, Certified Public Accountant,

For services rendered in the original suit to recover.

$10,000.00 [86] (e)

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[87]

[Endorsed]: Filed Nov 22 1937. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Helen Roach, Deputy Clerk.

[Endorsed]: Petr Monaghan's Exhibit No. B. Admitted and Filed Dec 20 1937. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Wm. H. Loveless, Chief Deputy Clerk. Case No. E-268 Phx. Gallegos vs. Intermountain. [88]

PETITIONER NEALON'S EXHIBIT No. 3

[Title of District Court and Cause.]

PETITION OF THOMAS W. NEALON FOR ALLOWANCE OF ATTORNEY'S FEES FOR LEGAL SERVICES RENDERED AND EXPENSES INCURRED IN THE PREPARATION AND TRIAL OF THE ABOVE ENTITLED SUIT

Comes Now Thomas W. Nealon and respectfully presents to this Court his petition for an allowance of attorney's fees for legal services rendered by him and expenses incurred by him in the preparation and trial of the above entitled suit, wherein

Petitioner Nealon's Exhibit No. 3—(Continued)
he was employed to represent the plaintiffs and others similarly situated, not specifically named as plaintiffs therein but who were represented by the plaintiffs named and who accepted and participated in the benefits resulting therefrom, 2,792 of them having elected to accept the benefits of his efforts in the premises, such benefits consisting in the recovery for their benefit of a trust fund of more than two million dollars, namely $2,119,-662.82, which would otherwise have been dissipated and totally lost to them; and in support of this petition alleges the following: [89]

I.

PETITIONER'S PROFESSIONAL EXPERIENCE

That he has been since 1914 and now is a member of the Bar of the Supreme Court of Arizona and of the United States District Court in and for the Federal District of Arizona, and has been at all times since said date in active practice before the state courts of Arizona and the Federal Courts of the District of Arizona;

That he is and has been for many years an active member of the State Bar of California and that of the United States Circuit Court of Appeals for the Ninth Circuit.

That during all of said period a large portion of his practice has been upon the equity side of the Federal Court.

Petitioner Nealon's Exhibit No. 3—(Continued)

II.

PETITIONER'S EMPLOYMENT

That many months prior to April 18, 1933, he was employed by certain lienholding creditors of the Intermountain Building & Loan Association, the defendant above named, to file suits against said corporation and establish equitable liens by court decree to recover trust property from the delinquent corporation and procure the appointment of a receiver to preserve and conserve the assets of said corporation then being wasted and dissipated by the said corporation, its officers and directors.

III.

INVESTIGATION OF THE FACTS

That immediately upon being employed as aforesaid, your petitioner began an investigation of the affairs of said corporation, searching all available sources of information to ascertain the financial condition of said corporation, the nature and extent of its assets and liabilities, the conduct of its officers and directors, as well as a study of the law applicable to the existing situation. [90]

IV.

CONDITION OF DEFENDANT CORPORATION

That in the course of this investigation, your petitioner discovered that the business of the defendant

Petitioner Nealon's Exhibit No. 3—(Continued)

corporation was being conducted in a manner contrary to law, extravagantly, wastefully and in a manner that would ultimately result in the waste and dissipation of all of the assets of the corporation, and that the corporation had been insolvent from about the year 1922, if not before that date, and that it was not a true building and loan association but a fraudulent corporation.

V.

RESULTS OBTAINED FOR BENEFIT OF CREDITORS

That as a result of this investigation made by your petitioner, which is outlined more fully hereinafter, your petitioner and E. G. Monaghan, an active member of the Bar of the United States District Court in and for the Federal District of Arizona, instituted this suit and represented said creditors in all proceedings until final judgment, although those in control of the corporation opposed relief for plaintiffs and those similarly situated all the way to the Supreme Court of the United States; that your petitioner was successful in every step, notwishstanding the great hazard of success, owing to the difficulty of procuring evidence, the novel questions involved, and the brilliant array of attorneys retained to oppose your petitioner, all of which is more fully set forth hereinafter.

That the success of your petitioner in this litigation resulted in saving to the creditors of the Asso-

Petitioner Nealon's Exhibit No. 3—(Continued)

ciation, assets of a value of $2,119,662.82, the following being a summary of the assets of said defendant corporation now in the actual or constructive possession of the receiver of said corporation:

[91]

The Arizona assets, as per inventory of April 1, 1937, have a value as per the books of the corporation and receiver, of		$1,597,841.89
The assets in other states, as shown in inventories of November 30, 1935, and April 1, 1937, amount to		1,135,229.34
Total		2,733,071.23
Less allowance for loss on realization:		
On Arizona assets	$248,228.54	
On assets in other states	365,179.87	
Total allowance for loss on realization as per report of H. S. McCluskey		613,408.41
Realization value of all assets		$2,119,662.82
In addition thereto, choses in action against M. E. Waddoups and other directors of the defendant corporation, from which should be realized $100,000.00.		

That 2,792 of the creditors of said corporation elected to avail themselves of the benefit of the decree obtained through the efforts of solicitors for plaintiffs.

VI.

CREDITORS OF THE CORPORATION

Your petitioner found upon his investigation that some 3,840 were creditors of said Association at that time; that the bulk of these creditors were people of

Petitioner Nealon's Exhibit No. 3—(Continued)

limited means, among them widows, orphans, guardians and old people, endeavoring to safely invest $5.50 per month and thus in the course of ten and one half years accumulate $1,000.00; that they possessed but limited business experience which was not sufficient to enable them to analyze the complicated corporate structure of the defendant corporation and they were influenced in making their investments by plausible propaganda presented by the corporation through newspaper articles, circulars and printed matter, as well as by high pressure salesmen. And in the contract itself it was specifically provided that the corporation should hold in [92] trust for each of plaintiffs and those similarly situated real estate mortgages in the amount of 100% of the amount due to each of them, and that these securities in the trust fund should be subject to the constant inspection of the banking officials of Utah or of the state in which the creditor resided.

CONTRACT TRUST PROVISION

The contract contained the following provision: "Privileges and Conditions.

> Security. As security for the performance of the obligations of the Association hereunder, the Association will hold intact, subject to the constant examination and inspection of the banking department of the State of Utah, first mortgages on improved Real Estate in an amount equal to at least one hundred percent of

Petitioner Nealon's Exhibit No. 3—(Continued)

its liabilities hereunder, less the amount of any loans made on this and like certificates or any certificates issued in lieu thereof."

VII.

DISCLOSURES OBTAINED BY INVESTIGATION

This investigation disclosed many wrongful acts committed by the defendant corporation resulting in the waste and dissipation of its assets and of the trust funds entrusted to it, and which caused the insolvency of the defendant corporation, some of which were as follows:

UNLAWFUL EXPENDITURES

During a period of 3½ years there had been unlawfully paid to one M. E. Waddoups as commissions on the sale of securities of the Intermountain Building & Loan Association (in many instances he receiving all that was paid into the corporation by the lender) the sum of $482,886.00

Dividends had been paid to said Waddoups and his associates that were never earned by the corporation and which were wrongfully paid from the trust fund belonging to the plaintiffs and others similarly situated, amounting to the sum of 418,649.50

[93]

That loans had been improvidently made, a large percentage of which were made in violation of the Articles of Incorporation and By-Laws of the Association, resulting in the loss of.... $765,182.78

The total loss on these three items along amount to $1,666,718.28

Petitioner Nealon's Exhibit No. 3—(Continued)

In addition to the above your petitioner found that an ex*h*orbitant and fictitious salary, the amount being impossible to estimate, was being paid to said Waddoups as president of the defendant corporation, and had been during a long period of time upon a basis of $24,000.00 per year, approximately 45% of which came from the trust fund belonging to the plaintiffs and those similarly situated, and which were paid in violation of the Articles of Incorporation and By-laws of the Association, while said Waddoups devoted only a part of his time to the business of the Intermountain Building & Loan Association.

WRONGFUL MANAGEMENT

Your petitioner further found that said M. E. Waddoups had dominated and controlled said corporation absolutely from the time of its organization in Utah in 1921 until his stock therein was purchased by one Daniel Alexander, in, to-wit, October of 1924, and that upon losing control of said corporation he moved from Salt Lake City, Utah, to Phoenix, Arizona, where he organized the First National Building & Loan Association, and through said latter corporation obtained control of the defendant corporation in, to-wit, August of 1930, and that at all times subsequent to that date up to the time of the appointment of the receiver herein by this Court he retained such control and manipulated its affairs for the benefit of himself and to the injury of the plaintiffs and those similarly situated.

Petitioner Nealon's Exhibit No. 3—(Continued)

WILFULL AND NEGLIGENT CONDUCT

That said Waddoups was using the funds of the Association to finance the operations of the Lincoln Mortgage Company, a [94] *a* company largely owned and absolutely dominated by him, and the defendant corporation suffered extreme losses through the manipulation of loans made upon buildings erected by said Lincoln Mortgage Company.

That prior to the organization of the defendant corporation said Waddoups had entered into a secret contract with one Daniel Alexander, in which it was agreed that said Alexander should be elected President of the defendant corporation, that Waddoups should not be an officer, but should receive a large commission upon all contracts issued by the corporation of similar tenor to those held by plaintiffs, and that they were to divide these profits derived from this transaction; that Alexander had sued Waddoups for his portion under such agreement, and that Waddoups had settled said suit before it came to trial.

Losses of an extremely large amount, the actual figures of which cannot be obtained, were suffered by the corporation through the negligence of its officers and directors in permitting taxes to accumulate on property on which they held mortgages, (some as long as ten years) and in some cases the amount of the delinquent taxes amounted to more than the value of the property. As a result of this negligence many properties were lost through tax

Petitioner Nealon's Exhibit No. 3—(Continued)

sales, and other properties necessarily have to be abandoned. Nor did these officers and directors of the corporation take any steps in court necessary to secure the payment of such taxes from the rental value of the property.

In the year 1931 alone unlawful dividends paid to the president of the Association and his associates amounted to some $119,312.68. During the same period, expenses, salaries, costs of collection and other items ran the expense up to $218,718.79, a sum greater than could have been collected from the interest of all of the mortgages held by the corporation and the rents from all the properties owned by the corporation. [95] The losses of the corporation during that period alone was probably in excess of $240,000.00.

That the Association had paid large sums of money to withdrawing certificate holders while it was insolvent, with the result that some of such holders had been paid in full while the plaintiffs and those similarly situated would receive under any circumstances only a portion of the money due them.

That the Association had and was continuing to transfer many of its assets to other corporations.

That the Association was not functioning for the purposes for which it was incorporated, that it was doing practically no new business or any profitable business and that it had lost the confidence of the public to such an extent that it could never be profitably conducted, and had lost all right to do any new business in Arizona.

Petitioner Nealon's Exhibit No. 3—(Continued)

VIII.

INSOLVENCY

The investigation disclosed that the conduct of the officers and directors of the defendant corporation had been such that at the time your petitioner filed suit herein, the liabilities of the corporation exceeded the assets of said corporation by more than $700,000.00, and that the corporation was hopelessly insolvent and had been so since 1922; that its paid-in capital never exceeded $3,460.00, and this was exhausted before 1922, and from that time on it traveled on money borrowed from these creditors.

IX.

CONCEALMENT OF TRUE STATE OF AFFAIRS

The true state of affairs of the corporation was concealed from the creditors and the public by the fact that the total liabilities upon obligations like those held by the plaintiffs and those similarly situated never appeared upon the [96] books of the corporation, and further by the fact that thousands of these obligations had been written off on the records of the corporation as if they had been forfeited, there being no authority of law whatsoever upon the part of the corporation and its officers so to do. As a result thereof there were hundreds of the creditors of said corporation who were entitled to participate in this trust fund whose rights had been totally lost. A large portion of the funds so

Petitioner Nealon's Exhibit No. 3—(Continued)

"forfeited" was absorbed by said Waddoups and his associates through a particular form of stock called "expense fund stock", although said funds belonged in a trust fund for the purpose of protecting those who had furnished money to buy the securities.

X.

FUNDS WRONGFULLY SENT OUT OF STATE

The officers and directors of the corporation also sent large sums of money out of the state for the purpose of giving a preference to residents of other states in the matter of the payment of claims similar to those of the plaintiffs herein and those similarly situated. That among these sums so taken, $40,000 was sent to California in 1929 and $50,000 in 1932, which sums were invested in securities that are now held in California (suit is now pending to recover the same for the benefit of the plaintiffs and those similarly situated and is being conducted for and on their behalf, the present receiver of the corporation also being a party thereto). There was also a similar attempt to give a preference to residents of Oregon and Wyoming, all in violation of the rights conferred upon the plaintiffs and those similarly situated.

XI.

FRAUDULENT ADVERTISING

The officers and directors of the defendant corporation also published in newspapers and circulars false

Petitioner Nealon's Exhibit No. 3—(Continued) reports that [97] the defendant corporation and five other building and loan associations, known as the Intermountain Building & Loan Group, dominated by said M. E. Waddoups, had a capital and surplus in excess of $8,000,000.00, at a time when each of these associations was insolvent and when approximately 45% of this amount represented liabilities of the defendant corporation, these reports being made with the intent of securing further contributions from persons situated as were the plaintiffs in this action and inducing the public to invest its money with the defendant by such false representations.

XII.

FAILURE OF UTAH BANK COMMISSIONER TO ACT

The defendant corporation was charged by law with the duty of filing reports showing its financial condition with the Banking Department of the State of Utah, and did make such purported reports each year for the years 1921 to and including 1932; that although the contracts issued to the plaintiffs and those similarly situated provided that the funds of said Association should be invested in first mortgages on improved real estate in an amount equal to at least 100% of its liabilities therein and that the mortgages should be at all times subject to the constant examination and inspection of the Banking Department of Utah, and although the Banking Department of Utah was empowered to make com-

Petitioner Nealon's Exhibit No. 3—(Continued)

plete examinations of the affairs of said defendant corporation, and did make numerous investigations thereof, and although by these reports and these examinations the said Bank Commissioner was fully informed, or by reasonable diligence could have been informed of the unsafe and unsound condition of said defendant corporation and the misconduct of its officers in declaring dividends from trust funds and other misconduct and neglect of its officers, and the insolvency of the corporation during all of the period from [98] 1922 to 1932, the Bank Commissioner of Utah, with all this information before him and all these resources at his command, failed, refused and neglected to take any steps for the protection of these plaintiffs and those similarly situated.

XIII.

THREATENED REMOVAL OF ASSETS

Your petitioner during the course of his investigation of the affairs of the defendant corporation received information from reliable sources that the corporation was planning to remove all of its personal property, including promissory notes and mortgages, and its books and records, out of the State of Arizona and out of the jurisdiction of this Court, so as to render it practically impossible for the plaintiffs and others similarly situated to protect their rights and to force them to go to a foreign jurisdiction in search of redress which could have only been procured at a prohibitive cost and then

Petitioner Nealon's Exhibit No. 3—(Continued)

only by actions similar to that which were taken by your petitioner on behalf of the parties interested; that your petitioner was also informed that the corporation had made settlements with the plaintiffs in the suits pending at that time in the state court so that the court would release the assets of the Intermountain Building & Loan Association from its control in order that these assets could be removed from the state of Arizona.

XIV.

LITIGATION IN STATE COURT

In order to prevent such removal of the assets of the defendant corporation from the jurisdiction of this Court, your petitioner did on the 27th day of June, 1932, institute such proceedings on behalf of the creditors of said defendant corporation in the Superior Court of Arizona, in and for the County of Maricopa, as resulted in the prevention of the removal of the personal property of the defendant corporation [99] from Arizona and thus preserved for the benefit of the plaintiffs herein and those similarly situated such assets and records, which would otherwise have been lost.

In these proceedings in the state court, your petitioner was opposed by many eminent members of the Arizona Bar, including Messrs. John L. Gust, Charles B. Ward, Alexander B. Baker, Louis B. Whitney and L. L. Howe.

Petitioner Nealon's Exhibit No. 3—(Continued)

XV.

NECESSITY FOR EQUITABLE RELIEF—FEDERAL SUIT

That it was obvious from the investigations made by your petitioner that if a Court of equity did not restrain the waste, mismanagement, misapplication of funds and the dissipation of the assets of the defendant corporation, that all of the assets would be dissipated in a short time, and every investor in this Association would lose every dollar they had put in, and that the only way this could be prevented was for this Court to take constructive possession of such assets and appoint some reliable person of its own selection to husband the dwindling assets of the corporation for the benefit of the creditors of the Association; and on the 18th day of April, 1933, your petitioner, together with said Elizabeth G. Monaghan, caused to be filed in said United States District Court for the District of Arizona a suit in equity for the purpose of recovering the trust fund herein described and conserving the assets of said corporation, having a receiver appointed for that purpose, and obtaining a restraining order and injunction to prevent the disposition or removal of such assets pending suit.

XVI.

CLASS SUIT

That the plaintiffs above named were among the lienholding creditors who employed your petitioner

Petitioner Nealon's Exhibit No. 3—(Continued)

to institute [100] suit, and said suit was filed in behalf of said creditors and all others similarly situated, the persons so situated being too numerous to be made parties to the suit, the bill of complaint containing the following paragraph:

> "That the plaintiffs bring this action on behalf of themselves and for all others similarly situated who desire to come in and bear their proportion of the expenses of this suit; that the persons so situated are too numerous to be made parties to this action."

The instant suit was not filed until the insolvency of the corporation and the misconduct of its officers had become widely known in the City of Phoenix, as well as the waste of its assets and the insolvency of the defendant corporation, and also that the First National Building & Loan Association which held the corporate control of the defendant corporation and dominated its affairs, had also become widely known to be insolvent, and said suit was not filed until it was apparent to anyone who examined into the affairs of the defendant corporation that this was the only method available of preventing the further dissipation of the assets, misapplication of funds and waste of the fast dwindling remnant of such assets.

XVII.

2,792 CREDITORS AVAIL THEMSELVES OF BENEFITS SECURED BY PETITIONER

That 2,792 of the creditors of said defendant cor-

Petitioner Nealon's Exhibit No. 3—(Continued)

poration elected to accept the above offer and thereby obligated themselves to pay to your petitioner a reasonable fee for the services rendered to them by him in said suit to the same extent as if they had signed a written contract to that effect before suit was brought. [101]

XVIII.

LEGAL PROBLEMS AND PETITIONER'S INVESTIGATION THEREOF

Your petitioner made an intensive study of the law applicable to the facts ascertained through his investigation, and based the said complaint upon the theory that the plaintiffs and those similarly situated were entitled to equitable relief, and prayed for such relief upon the following theory:

That a federal district court has equitable jurisdiction to entertain a class suit when one of the complainants is a creditor holding a claim in excess of $3,000.00 secured by an equitable lien; that no state can by statute or otherwise deprive a federal court of its jurisdiction or limit that jurisdiction in any particular;

That the contracts entered into between the defendant corporation and the plaintiffs and those similarly situated, created equitable liens in favor of the latter and created the relation of debtor and creditor between the parties to such contracts; that a federal court of equity at the instance of lien-holding creditors has jurisdiction to appoint a receiver for the assets of a building and loan associa-

Petitioner Nealon's Exhibit No. 3—(Continued)

tion incorporated in a state other than that in which the court is sitting, when the jurisdictional facts exist and justify the granting of equitable relief, and as an incident thereof the appointment of a receiver when the association is doing business in the state where the court is sitting;

That equal protection of the law is granted to each and every creditor of a corporation regardless of his residence or citizenship, and no state can by statute give a preference to its own citizens or residents over those of any other state;

That when a federal court of equity obtains jurisdiction over a corporation by means of a sufficient bill of complaint [102] and personal service upon the corporation, or its authorized agents, such court has the power to compel such corporation to execute deeds and other conveyances to real or personal property in the states where the property is situated when the property involved is a trust property and the conduct of the corporate trustee has been such as to justify its removal and the appointment of a receiver to take possession of its assets;

That the police powers of a state do not extend beyond its physical boundaries and state officers as such cannot exercise any of their delegated powers outside of such state except that, where the statutes of that state vest title to the assets of a delinquent corporation in such officer and proper steps have been taken to wind up the affairs of such delinquent corporation, the statutory receiver may be

Petitioner Nealon's Exhibit No. 3—(Continued)

vested with title to the property actually owned by the corporation wherever situated;

That the articles of incorporation of the defendant corporation and the statutes of Utah vested said defendant corporation with the power to borrow money and pledge its property to secure the payment of its obligations; that the statutes of Utah did not vest its bank commissioner with title to the assets of a defunct building and loan association;

That the defendant corporation was insolvent and its liabilities exceeded its assets by more than $500,000; that its affairs had been mismanaged by its officers and directors who had wasted its assets for eleven years, had paid dividends amounting to hundreds of *thousand* of dollars to themselves when the corporation was insolvent, the payments being made from funds rightfully belonging to the complainants and those similarly situated; that its expenses exceeded its earnings in 1932 by more than $70,000; that it paid extravagant salaries for nominal services; that its liabilities were falsely stated upon its books; that it made false statements in its [103] published statements and advertisements in order to obtain money from complainants and those similarly situated; that all of its properties were being wasted to such an extent that there would be no funds left to pay anything to complainants and those similarly situated and their claims would be a total loss unless this Court took complete charge of its affairs and salvaged the same for the benefit of its creditors;

Petitioner Nealon's Exhibit No. 3—(Continued)

That with records in his office revealing this state of the corporation's affairs, the Bank Commissioner of Utah permitted the officers and directors of the corporation to mismanage the affairs of the corporation, waste and absorb its its assets, misapply its trust funds, obtain fresh loans from the public by false representations as to its financial condition, and took no steps to correct this condition, and although the Bank Commissioner had accepted the trust to constantly inspect the trust fund which the corporation had agreed to set aside for the protection of the complainants and those similarly situated, he never at any time or at all took any steps to protect such fund or the persons who were being defrauded;

That the state officers of California, Oregon, Idaho and Wyoming were guilty of a like dereliction of duty in permitting such trust funds to be misapplied and wasted and dissipated, although they made repeated examinations of the affairs of the corporation, which if properly conducted would have revealed the truth;

That an imperative necessity existed for the appointment of a receiver if the complainants and those similarly situated were to recover a single dollar of the money they had loaned to the corporation on the faith of their contracts by which the corporation had agreed to hold these assets in trust subject to the constant examination and inspection of the banking department of the state of Utah to secure such loans, and that [104] no other adequate

Petitioner Nealon's Exhibit No. 3—(Continued)

remedy existed for the protection of these creditors other than the one pursued in this proceeding.

XIX.

That process was duly issued in said suit and service had upon the defendant, and a restraining order was immediately issued against the defendant restraining the defendant from disposing of the assets of the defendant corporation and from removing, destroying or concealing its books, records, files, documents and other property of the defendant then in the state of Arizona.

XX.

DEFENDANT'S RESISTANCE—ITS THEORIES

The defendant corporation vigorously resisted the suit of the plaintiffs herein, employing Messrs. Charles B. Ward, R. G. Langmade, Charles L. Rawlins, and George H. Rawlins, all outstanding members of the bar of this Court as their solicitors to defend said suit.

They filed various dilatory motions in which they sought to have the restraining order modified and vacated and attacked the complaint, particularly upon the ground of lack of jurisdiction of this Court and upon the ground of failure to state sufficient facts to entitle the complainant to any relief.

These solicitors were well versed in federal equity practice and ably presented the contentions of the defendant corporation. They denied the right of

Petitioner Nealon's Exhibit No. 3—(Continued)

this Court to give the necessary protection to these plaintiffs and those similarly situated, not only upon the facts of the case but upon the law as well, and further contended:

That this Court had no jurisdiction to appoint a receiver for this corporation; that the sole right to liquidate the assets of the corporation was in the Bank Commissioner of the [105] State of Utah, the corporation having been organized under the laws of that state; that the appointment of a receiver would be an abuse of discretion by the court and would result in the acceleration of the due date of all mortgages held by it and would thus work a great injustice to the mortgagors; that the facts alleged in the bill of complaint did not justify the issuance of a restraining order or an injunction, or the appointment of a receiver; that the plaintiffs were not creditors but stockholders; that the plaintiffs' contracts did not create a lien in their favor;

That plaintiffs were not entitled to withdraw funds or demand the payment of their certificates, basing this contention upon the ground that they had failed and neglected to carry out their contracts with the defendant and that the defendant had kept and performed its contracts with the plaintiffs according to the conditions therein and the by-laws of the Association, which the defendant corporation alleged specifically provided that not more than one half of the fund received by the Association in any one month should be applicable to the payment of withdrawing members and that with-

Petitioner Nealon's Exhibit No. 3—(Continued)

drawals should be paid in rotation according to priority of notice, and that there were other stockholders of the Association who had applied prior in time to the filing of the applications of plaintiffs who had not been paid in rotation or whose turn for payment had not been reached for the reason that sufficient funds of the Association had not been received applicable to the payment of claims of withdrawing members, and contended further that under the laws of Utah not more than one half of the monthly receipts in any one month might be applied to the withdrawals for the month without the consent of the board of directors of the corporation.

The defendant corporation also denied insolvency, mismanagement, waste of assets, and the other material allegations [106] of the complaint.

They supported their contentions by briefs and oral argument of able counsel for defendant.

XXI.

PETITIONER'S REPLY TO DEFENDANT'S CONTENTIONS

Your petitioner and his co-solicitor met the contentions of the defendant by extensive briefs and oral arguments, contending that:

The court had jurisdiction to appoint a receiver of a foreign corporation at the instance of creditors where fraud and insolvency were involved; that the Bank Commissioner of Utah was appointed under

Petitioner Nealon's Exhibit No. 3—(Continued)
the police power of that state and the police power did not extend beyond the territorial jurisdiction of that state;

That the mortgages held by the corporation were straight mortgages that provided a definite term of payment and were not mortgages of such a character whose due date would be accelerated by the failure of the corporation; that the facts alleged, namely insolvency, mismanagement and dissipation of the assets were sufficient grounds for the relief sought and were fully supported by affidavits filed in this proceeding;

That the plaintiffs were not stockholders but creditors; that the contracts created equitable liens and a trust of which the federal courts of equity could and would take jurisdiction; that under defendant's construction of the contracts, the obligations to plaintiffs and those similarly situated would never be payable and that such construction would be a fraud upon such creditors;

That the verified complaint showing insolvency and the affidavits filed in support thereof made a prima facie case which could only be refuted by a showing of solvency, the production of the books and records of the corporation and a [107] complete disclosure of the truth of its condition in the pleadings of the defendant corporation.

Petitioner Nealon's Exhibit No. 3—(Continued)

XXII.

ASSOCIATE COUNSEL

Upon the hearing of the petition for the appointment of the receiver and upon the motion of defendant to modify the restraining order, your petitioner being unable to be present, was represented by Joseph M. Nealon, a member of the bar of 32 years experience, now Chief Justice of the Court of Civil Appeals of the Eighth Supreme Judicial District of Texas, and who at this particular time was of counsel for the trustee in bankruptcy of the Bay Cities Building & Loan Association in the Federal Courts of Los Angeles, California, in which work he had become familiar with the issues involved in this litigation, and said Joseph M. Nealon later assisted your petitioner by furnishing him with briefs and authorities which were of consderable service in the further presentation of the issues involved.

XXIII.

COMMISSIONER MALIA'S ATTEMPTED INTERVENTION

After various oral arguments and the filing of briefs going to the question of law raised by the motions and demurrers of the defendant, and while the court had the same under consideration, but before the Court had given its decision in the matter, J. A. Malia, then Bank Commissioner of the state of Utah, did, on the 26th day of September, 1933, file a petition for leave to intervene in this

Petitioner Nealon's Exhibit No. 3—(Continued) proceedings for the purpose of having the books, records and movable assets of the corporation removed to the state of Utah, upon the alleged ground that he could have closer supervision over the affairs of the corporation, he alleging in his motion or petition for leave to [108] intervene that the defendant corporation had since 1921 conducted a successful building and loan business. This allegation was made notwithstanding the fact that he then had in his possession full information in the records of his office of the insolvency of the corporation and mismanagement of its affairs, and notwithstanding the fact that he had notice for months previously of the filing of this suit and of the filing of the affidavits in connection therewith which directly called to his attention the true condition of the defendant corporation.

He further alleged that the corporation being a Utah corporation, he was vested with exclusive jurisdiction over the affairs of the defendant to the exclusion of this or any other court, and prayed for an order of this court permitting him to file his complaint in intervention and to be forthwith entered as intervenor in said action, and for other and further general relief. The purpose of said intervention was to divest this Court of all control of the assets of the defendant corporation which were then in the constructive possession of this Court, and to remove such assets beyond the jurisdiction of this Court.

Petitioner Nealon's Exhibit No. 3—(Continued)

Said petition was verified by D. M. Draper, a member of the Bar of the State of Utah and assistant attorney general of that state, and he represented said Malia as Bank Commissioner in presenting said petition to the Court.

XXIV.

PETITIONER OPPOSES MALIA AND IS SUSTAINED

Upon the presentation of the petition of said Malia, your petitioner strongly opposed the same and alleged that there had been no compliance with the Federal equity rules governing intervention, and among other points, alleging that the jurisdiction of the court in the premises had not been admitted as required by such rule. The Court sustained the position of your petitioner and refused to recognize the intervention by [109] Malia. Thereupon an application was then made to the Court to allow Mr. Draper to appear as counsel pro hac vice for the defendant corporation and he then associated himself with the other counsel representing the defendant corporation as one of counsel for the defendant resisting the complaint of the plaintiffs herein. Mr. Draper argued strongly and ably against the right of the Court to appoint a receiver, as against the wishes of the Bank Commissioner of Utah. The Court granted Mr. Draper further time to amend his petition or show any right to intervene in the proceedings.

Petitioner Nealon's Exhibit No. 3—(Continued)

After the hearing on September 26, 1933, towit on October 3, 1933, the solicitors for the plaintiffs filed formal written motions to dismiss the petition of Malia for leave to intervene, supported by points and authorities, and duly served the same upon him as well as upon the defendant. The Bank Commissioner of Utah did not avail himself of the opportunity granted him by the Court to amend his petition to intervene and on the 3rd day of January, 1934, his petition was dismissed.

XXV.

LAW QUESTIONS DECIDED

After due consideration by the Court on the various briefs and oral arguments made, the Court denied defendant's motions and overruled their demurrers, thus settling all the law questions. The cause then awaited the convenience of the Court for the purpose of setting a date for the hearing of the cause.

XXVI.

SEIZURE OF ASSETS BY MALIA

This was the situation that existed a few days prior to the 17th day of March, 1934, when said J. A. Malia, with the consent and acquiescence of M. E. Waddoups took possession of the assets of the defendant corporation in Arizona (which was [110] then in the physical possession of the corporation), notwithstanding the constructive possession of said assets in this Court. A. J. Bruneau,

Petitioner Nealon's Exhibit No. 3—(Continued)

secretary and general manager of the defendant corporation protested the seizure of these assets without this Court's consent, but without avail.

Malia also attempted to secure possession of the moneys of the corporation deposited in the Valley National Bank of Phoenix and the Phoenix National Bank, but each of these institutions refused to turn over possession of such funds to him. Following this refusal Malia then appeared in the United States District Court and filed an amended petition for leave to intervene as Bank Commissioner of the state of Utah, on March 23, 1934, seeking to procure an order from this Court disclaiming any right to appoint a receiver or take possession of the assets of the defendant and sought an order that would destroy the force and effect of the restraining order issued by the court on April 18, 1933, which was still in effect. He was represented at this time by Messrs. Moore & Shimmel, eminent attorneys of Phoenix.

MALIA'S ALLEGATIONS

Malia based his right to intervene upon the allegation that he had theretofore, on, towit, March 17, 1934, seized the assets of the defendant corporation in Utah and that he had prior to the time of the filing of said petition procured an order from the state district court in Utah authorizing him to take possession of all of the assets of the corporation, and that he claimed title to the assets upon the theory that he was so vested by the terms of the Utah Statutes.

Petitioner Nealon's Exhibit No. 3—(Continued)

XXVII.

PETITIONER AGAIN OPPOSES MALIA

The solicitors for plaintiffs vigorously opposed the contention of the Bank Commissioner of Utah and filed a petition [111] for the immediate appointment of a receiver and procured an order to show cause thereon. They alleged that said Malia had failed, neglected and refused theretofore to take action to protect the investors in said Association, although he was fully informed, or by reasonable diligence could have been informed of the unsafe and unsound condition of the defendant corporation and that with all this information before him, he did on the 26th day of September, 1933, assert in a written pleading filed in this court that the defendant corporation "since 1921 has conducted a successful building and loan business throughout the several states of the Union under the supervision of the Bank Commissioner of the state of Utah", and your petitioner also alleged that from the records and files in the cause it appeared that he was negligent in his supervision of the affairs of the corporation and lacked the qualities necessary to a proper administration of its affairs, and that he had for a long period of time suffered said corporation to continue business in an unsafe and unsound condition when he had access to their records and could have by the use of ordinary diligence discovered the condition of its affairs.

The defendant corporation and Malia filed answer

Petitioner Nealon's Exhibit No. 3—(Continued)
and objections to this petition of plaintiff for the immediate appointment of a receiver and strenuously fought the granting of the petition in the premises. In these proceedings Malia was further represented by two members of the Bar of Salt Lake City, Messrs. H. Van Dam and H. L. Mulliner, in addition to said Messrs. Moore & Shimmel.

XXVIII.

PETITION OF PLAINTIFFS GRANTED

These issues were heard by the Court on the 10th day of April, 1934, at which time evidence was introduced and exhaustive arguments made, and from the bench the Court made the [112] following order:

> "I will enter an order of record in this case at this time directing Mr. Malia to leave all the papers and records and files and the property of the Building and Loan Association in the state of Arizona and not remove them. That goes to all assets, books, records, files, money and everything else that belongs to this association; that they do not be removed from this state. That order is in effect until this matter is disposed of or until further order of the Court."

The cause was ordered submitted on briefs, and your petitioner was directed to prepare a brief upon the particular point involved as to the rights of the Bank Commissioner of Utah in the premises. This

Petitioner Nealon's Exhibit No. 3—(Continued) was the first occasion in the history of law, so far as your petitioner is informed, in which the question of the unfitness of a state official to administer the assets of a delinquent corporation had been raised as a ground for the appointment of a receiver, and proved an important question in the subsequent conduct of the litigation.

On the 20th day of April, 1934, the Court granted the petition of plaintiffs for the appointment of a receiver pendente lite, appointing Hon. Henry S. McCluskey as such receiver and continued in force the injunction and restraining order theretofore entered by it. The Receiver qualified on the date of his appointment and demanded possession of the assets, but his demand was refused.

XXIX.

DEFENDANT CORPORATION AND MALIA APPEAL TO CIRCUIT COURT OF APPEALS

That immediately upon the entering of the interlocutory decree appointing Henry S. McCluskey, Receiver, notice of appeal [113] was given by the defendant corporation and J. A. Malia, Bank Commissioner of Utah. This appeal was granted by the court and supersedeas bond fixed in the sum of $35,000.00. James R. Moore, solicitor for the proposed appellees, together with your petitioner then appeared before the Honorable Fred C. Jacobs, the Judge who tried the cause, and settled the statement of evidence and the appeal was duly perfected.

Petitioner Nealon's Exhibit No. 3—(Continued)

XXX.

PROCEEDINGS ON APPEAL

In June of 1934 and before the case was at issue in the Circuit Court of Appeals the defendant corporation filed a motion for modification of the injunctive order made by this Court, and also filed a brief therewith. This was opposed by your petitioner and his co-solicitor, who filed an answer and brief thereto. The Circuit Court of Appeals denied this motion of the defendant corporation.

The appellants filed their brief on appeal in due season contending that the appellees were stockholders (the certificates labeled them as such); that the bill of complaint was without equity; that the court abused its discretion in appointing a receiver; that the appellees had no lien upon the assets of the corporation; that the Bank Commissioner of Utah was the statutory liquidator and vested with title to the Association's assets, and that under the full faith and credit clause of the Constitution the court was bound to recognize the title of the Bank Commissioner of Utah to the assets of the corporation; that the court will not appoint a receiver at the suit of an unsecured, nonjudgment creditor, and that the court should not interfere with the internal affairs of a foreign corporation.

Your petitioner and his co-solicitor filed their answering brief thereto within the time required by law contending: [114]

That the labeling of the certificate as stock did

Petitioner Nealon's Exhibit No. 3—(Continued)

not make it such, and the instrument itself created the relation of debtor and creditor between the contracting parties; that the facts stated in the complaint showed appellee's right to equitable relief and that they were holding equitable liens and that the defendant was false to its trust; that the facts presented to the court by the verified petition of plaintiff, and otherwise, were such as to require it to grant the injunctive relief and appoint a receiver; that the contracts between appellants and appellees created equitable liens in favor of appellees and the assets of the corporation were a trust fund to secure the repayment of the money borrowed from the appellees and those similarly situated; that the Bank Commissioner of Utah was not vested with title to the assets of the corporation; that the appointment of a receiver is an ancillary remedy which a federal court of equity will grant to a lienholding creditor in a proper case; that the appellees and those similarly situated being creditors and not stockholders the issue was not one of internal management but the right of creditors to prevent the waste of a trust fund; that Malia had no rights in the premises, but if he ever had any he had lost same by his negligence and failure to protect the rights of all lienholding creditors, he having ample information in his own office of the wrongful conduct of the defendant corporation and its insolvency.

While this matter was at issue in the Circuit Court of Appeals the Supreme Court of the United States on the 4th day of February, 1935, handed

Petitioner Nealon's Exhibit No. 3—(Continued)

down four decisions involving the rights of statutory liquidators, and the appellants thereupon filed a supplemental brief in the Circuit Court of Appeals based upon the theory that these decisions required a reversal of the decree rendered in the District Court. In opposition to [115] this contention your petitioner and his co-solicitor filed their supplemental brief.

XXXI.

CIRCUIT COURT OF APPEALS SUSTAINS PETITIONER

The cause was argued at San Francisco on the 28th day of February, 1935, by your petitioner, his co-solicitor being present in Court on that occasion.

The matter was taken under advisement, and on the 5th day of August, 1935, the Circuit Court of Appeals rendered its decision in which it affirmed the interlocutory decree of the United States District Court appointing Henry S. McCluskey as receiver and issuing an injunction pertaining to the assets of the corporation, and in its opinion the Circuit Court of Appeals said that the Court below "might well have arrived at the conclusion that the corporate chaos had been a matter of years, rather than months, and that therefore the Bank Commissioner of Utah in whose office admittedly there were filed reports containing 'full information as to the status of the defendant corporation', had shown himself not to be a proper person to husband the dwindling assets of the failing Association."

Petitioner Nealon's Exhibit No. 3—(Continued)

That the appellants thereupon filed motion for the purpose of having certain papers in the District Court sent up to the Circuit Court of Appeals, which motion was opposed by your petitioner and his co-solicitor, and the certiorari therefor was subsequently denied.

XXXII.

PETITIONER SUSTAINED IN UNITED STATES SUPREME COURT

The appellants then filed their motion for rehearing and this was also denied, and they thereupon filed their petition for writ of certiorari in the Supreme Court of the United States and their briefs thereon, in which they made the contentions [116] that the Circuit Court of Appeals had denied full faith and credit to the statutes of Utah and decided a federal question in conflict with the decision of the United States Supreme Court in the case of Clark v. Willard, 292 U. S. 112 and 294 U. S., 211; and that in affirming the decision of the District Court appointing a receiver and displacing the Bank Commissioner of Utah, its decision was contrary to the four decisions hereinbefore mentioned which involved the rights of statutory liquidators and which had been rendered while this case was at issue in the Circuit Court of Appeals.

To this your petitioner and his co-solicitor filed their opposing briefs, contending that the decision of the Circuit Court of Appeals was not in conflict with the cases cited, that no federal question

Petitioner Nealon's Exhibit No. 3—(Continued)

or other question of public importance which had not theretofore been settled by the Supreme Court was involved, and that there was no departure from the accepted and usual course of judicial proceedings in the court's decree.

The petition for writ of certiorari was denied by the Supreme Court on November 11, 1935.

XXXIII.

TRIAL AND FINAL DECREE

That on the 29th day of September, 1936, the suit was tried upon the merits, your petitioner and Elizabeth G. Monaghan appearing for the plaintiffs, and James R. Moore, Esq., of the law firm of Moore & Shimmel appearing for the defendant, and after hearing the evidence the Court directed that findings of fact and conclusions of law be prepared by counsel for plaintiffs and that decree be entered for the plaintiffs.

That on towit, the 5th day of January, 1937, the District Court for the District of Arizona made its decree in which it among other things, established the liens of the creditors, affirmed the appointment of Henry S. McCluskey as [117] receiver, and made the injunction theretofore rendered permanent, thereby establishing the rights of said lienholding creditors who desired to come in and obtain the benefits of the judgment upon the conditions named in the invitation contained in the complaint, namely, that they should bear their proportionate share of the expenses of the

Petitioner Nealon's Exhibit No. 3—(Continued)
litigation, which included the attorneys' fees herein petitioned for;

And further said decree secured the trust fund wherever situated to the plaintiffs in this suit and those similarly situated, said decree providing and ordering that deeds and other conveyances to the property of the corporation wherever situated should be executed by the corporation to the receiver as trustee for the benefit of all these parties, said decree having been obtained after personal service and appearance by the corporation; that this provision was made for the reason that a receiver appointed by a United States court is not vested with title, but such court has power to compel the defendant to execute deeds and conveyances to its property wherever situated when the same is trust property; that such decree is binding upon all situated similarly to the named plaintiffs, regardless of any active participation in the suit.

XXXIV

INTERVENTIONS

In accordance with the invitation contained in the complaint, other creditors similarly situated to plaintiffs in this action employed their own attorneys, and O'Sullivan and Morgan of Prescott, Arizona, filed motion for leave to intervene in these proceedings as plaintiffs. The court granted this leave to intervene, solicitors for plaintiffs acquiescing in the granting of the motion to inter-

Petitioner Nealon's Exhibit No. 3—(Continued)

vene. However, they never filed a complaint in the proceedings or took other action therein.

H. C. Smoot and Sophia Smoot, through their solicitor [118] E. O. Phlegar, filed a motion for leave to intervene, solicitors for plaintiffs acquiescing therein. Their motion was granted and bill of complaint was filed therein by Mr. Phlegar on behalf of his clients. He appeared in subsequent proceedings up to the termination thereof in the United States District Court, but subsequently withdrew and took no part in the appeal or the proceedings in the United States Supreme Court.

XXXV.

LABOR INVOLVED—OBSTACLES INTERPOSED

That the burden of the conduct of the litigation herein described and the other proceedings in connection with the recovery and preservation of the trust funds herein mentioned fell upon your petitioner, as well as the investigations and research work necessary to the successful conduct of such litigation.

That the labor of your petitioner was arduous and difficult, the results of the litigation by no means certain and the hazard great.

Your petitioner had great difficulty in procuring the evidence to establish the facts for the reason that the books and records were in the exclusive possession of the officers, directors and em-

Petitioner Nealon's Exhibit No. 3—(Continued)

ployees of the defendant corporation, who, as well as their attorneys, refused access thereto to your petitioner and his associate solicitor, and were hostile to plaintiffs. That it thus became necessary for your petitioner to obtain his information from indirect sources.

This necessitated an examination of the records of the Arizona Corporation Commission and the Arizona Banking Department, so far as they pertained to the affairs of this corporation; and investigation into the records of the state courts in foreclosure proceedings and other litigation in which the defendant corporation was involved; interviews with other [119] attorneys who had claims against the defendant and allied corporations; procuring advertising matter and printed statements of the corporation as far as they could be obtained by diligent search.

Further your petitioner attended upon trials in the state courts where proceedings were pending against the corporation which held the corporate control of the defendant, so that he might obtain the evidence necessary to establish the allegations of the complaint of plaintiffs in this action. Your petitioner also had interviews with representatives of the federal government who had come to the office of your petitioner in search of evidence against said M. E. Waddoups, and who in turn furnished your petitioner with valuable information.

It was necessary to employ clerical help in order to obtain copies of the reports of said Associa-

Petitioner Nealon's Exhibit No. 3—(Continued)

tion filed in the office of the Bank Commissioner of Utah annually from the year 1921 up to and including the year 1932, and it was necessary to employ certified public accountants to work with your petitioner and his co-solicitor in order to break down and analyze these reports for the purpose of obtaining the evidence therefrom to establish the insolvency of the corporation material to the controversy, and to establish the fraud and mismanagement of its directors, as well as the negligence of the Bank Commissioner in permitting the corporation to do business when by the reports on file in his office and an examination of the affairs of the corporation, he knew, or could have known, by the use of ordinary diligence, the insolvency of said corporation; that he also sent for and obtained the records of the suit filed by Daniel Alexander against M. E. Waddoups hereinbefore mentioned, in which was disclosed the secret contracts under which the unlawful commissions to the amount of several hundred thousand dollars had been unlawfully paid to Waddoups. [120]

The proof of the insolvency of the defendant corporation and the misconduct of its officers had to be wrung from these published reports, and was a time consuming and laborious process.

The contracts between the defendant corporation and its creditors when examined, disclosed that the corporation was promising to pay such creditors interest at the rate of 8.84% per annum. Outside investigation disclosed that evidence was

Petitioner Nealon's Exhibit No. 3—(Continued)

available sufficient to prove that Waddoups and others received commissions of from three to seven percent for obtaining the funds represented by these contracts. These ran the total cost of the money borrowed to the sum of $67.40 per year for each $663.00, or a fraction more than 10%, while other evidence obtained by your petitioner disclosed that the bulk of the loans, in Arizona at least, were made upon a basis of 8%. The effect of this was to show that the defendant corporation's total income from its loans was not sufficient to pay the interest upon the money it had borrowed, and that consequently there was no income with which to pay expenses of doing business, and that the corporation was becoming further insolvent each year to the full measure of the expenses incurred by it.

In order to prove these facts it was necessary not only to have the records mentioned from the office of the Bank Commissioner of Utah, together with supporting affidavits, but also outside affidavits showing this excess cost. These were procured showing admissions of M. E. Waddoups that he received a commission of 3% on all such items and affidavits showing payments to other parties for commissions.

Your petitioner made an examination of the statutes of Utah and these disclosed that corporations similar in nature to the defendant were required to file verified annual statements with the Banking Department of Utah, and that it was the duty [121] of the Bank Commissioner of Utah to make

Petitioner Nealon's Exhibit No. 3—(Continued)

periodical examination of the affairs of the corporation.

Your petitioner with this information before him conceived the idea that the defendant could not file such reports for a period of eleven years without revealing the true condition of the corporation, and that a breakdown of such reports by competent accountants familiar with that line of business would necessarily reveal, when taken in connection with other evidence existing and available, that the corporation was and had been insolvent for years; that its expenses had exceeded its income for many years and that these statement would probably reveal the misconduct of the officers and directors of the defendant, as well as the mismanagement of its affairs and waste of its assets. At the instance of your petitioner copies of these reports for eleven years were procured from the office of the Bank Commissioner of Utah, and affidavits were procured from the persons who made these copies to the effect that they were correct. The reports themselves had been sworn to by officers of the corporation at the time they were filed. Upon procuring these, your petitioner and his co-solicitor consulted with Messrs. Willis H. Plunkett and James A. Smith, Certified Public Accountants, familiar with accounting in all its branches, including building and loan accounting, and submitted these reports to these accountants, together with the contracts held by plaintiffs for the purpose of having such reports analyzed and broken down. As a result of such consulation and such work upon the

Petitioner Nealon's Exhibit No. 3—(Continued) part of Messrs. Plunkett and Smith and the analysis and breaking down of such reports in connection with other evidence assembled by the solicitors for the plaintiffs, your petitioner procured sufficient evidence to establish a prima facie case to obtain the relief prayed for in the bill of complaint. [122]

As the facts involved were many and not susceptible of proof by "demonstrable evidence" this case came within the definition of hazardous cases (upon the facts), as the rule is set forth in the case of United States v. Equitable Trust Co., 283 U.S. 738, 75 L.ed 1379.

XXXVI.

NOVEL LAW QUESTIONS INVOLVED

By reason of the fact that many novel questions of law were involved, it was necessary for your petitioner to make an exhaustive study of the applicable principles of law and of the authorities which would sustain those principles upon a hearing in court and prove to the court the right of the plaintiffs to the relief they sought.

It was also necessary to make an exhaustive study of the statutes of Utah to ascertain whether there was anything in those statutes, which as a matter of public policy of that state, would render contracts of the nature of plaintiffs and those similarly situated void in so far as they attempted to create a lien, and this investigation enabled your petitioner to establish to the satisfaction of the various courts the validity of these liens.

Petitioner Nealon's Exhibit No. 3—(Continued)

Much study was necessary also to an interpretation of the statute laws of California, Oregon, Idaho and Wyoming, in which states this corporation was doing business.

Novel and difficult questions of law were involved in this litigation, questions that had not been definitely determined until the decision of the Supreme Court in this case, and to properly present these questions and overcome the contentions of the defendant corporation in opposition thereto, necessitated an immense amount of research work. The applicable principles of law had not at the time your petitioner filed the complaint [123] herein been determined by the Supreme Court of the United States nor by any of the federal courts of appeal and were therefore uncertain.

The contention of your petitioner that the United States Court had a right to appoint a receiver of a building & loan association where the statutes at the domicile of the corporation provided for a liquidator by a state official, when the state official had shown himself unfit to administer the affairs of the delinquent corporation, and when the statutes under which he was appointed were inadequate to give this protection to litigants, a question raised for the first time in the annals of law so far as your petitioner is aware, was upheld by the Circuit Court of Appeals, and for the first time that right was definitely settled and that principle established by the denial of the writ of certiorari by the Supreme Court.

Petitioner Nealon's Exhibit No. 3—(Continued)

The contention of your petitioner that the relation of debtor and creditor was created by the particular contracts, and that a trust and lien was created as against the Building and Loan Association on behalf of the holders of the certificate, also raised for the first time, was established definitely, and in its decision the Circuit Court of Appeals definitely held that despite the label attached to the certificates, the instruments were not stock, but created the relation of debtor and creditor, and that the language of the contract was sufficient to create an equitable lien in favor of such creditor, this also being established for the first time.

Also though prior to this time it had been established that a building and loan association could borrow money and issue its promise to pay in the form of investment certificates, it had not been held that a building and loan association could pledge or mortgage its assets for the purpose of securing loans so obtained, until the final decision in this case. [124]

Another novel question involved the force and effect of a statute of the state under which a corporation was organized when that state permitted a building and loan association to remove its principal office to another state and carry on business in the foreign jurisdiction.

That in the course of his research work, your petitioner examined and analyzed more than six hundred cases bearing upon the issues involved, as well as the statutes of the various states and many

Petitioner Nealon's Exhibit No. 3—(Continued)

text books, this extensive research being necessary by reason of the numerous novel questions of law involved. This case therefore comes within the definition of a hazardous case in regard to the law as set forth in the case of United States v. Equitable Trust Co., supra.

XXXVII.

PETITIONER'S WORK

That the major portion of the time of your petitioner for a period of more than three and one half years was devoted to labor for and on behalf of the plaintiffs and those similarly situated in the study of the principles of law governing the case, the analysis of the facts involved and assembling of evidence to support the allegations of the complaint, the preparation of pleadings in the case and obtaining the various orders and decrees in this suit, and in defending the decree of the lower court in the Circuit Court of Appeals and Supreme Court of the United States, and the preparation as to the law and facts necessary to a successful conclusion of the case.

That the necessary work for the preparation of the various briefs in the United States District Court, the Circuit Court of Appeals and the Supreme Court consumed more than 2930 hours, or 586 court days, based upon the standard prevailing in this district,—this exclusive of the time spent in preparation [125] of the necessary pleadings filed in the District Court and in miscellaneous re-

Petitioner Nealon's Exhibit No. 3—(Continued)

search work, examinations made of the records of the Corporation Commission and State Banking Department, attendance on hearings in other courts wherein evidence against the defendant was being developed, attendance at hearings before the United States District Court and Circuit Court of Appeals at San Francisco, examination and study of pleadings and briefs of the opposition, conferences with attorneys for the defendant and the Bank Commissioner of Utah, conferences with Home Owners Loan Corporation officials, and conferences with attorneys representing particular creditors, including attorneys for intervenors, and with various creditors of the defendant corporation.

XXXVIII.

ASSETS RECOVERED FOR BENEFIT OF CREDITORS

That on towit, the 30th day of November, 1935, Rulon F. Starley, who had succeeded J. A. Malia as Bank Commissioner of Utah, turned over to Henry S. McCluskey, Receiver appointed by this court as aforesaid, the physical possession of the assets in Arizona, as well as the books and records of the corporation in Arizona. These assets amounted to the gross sum of $1,597,841.89, and are now in possession of *Hary* W. Hill, Esq. who succeeded Mr. McCluskey as receiver on April 1, 1937.

The Receiver having been originally appointed by

Petitioner Nealon's Exhibit No. 3—(Continued)
this Court and decree having been obtained requiring the conveyance of title, that decree would have to be recognized in other states where the defendant had property. As a result thereof this suit established the rights of these creditors in the property wherever situated and is res adjudicata of all questions involved in the proceedings, and is binding upon all those similarly situated to the plaintiffs in this suit regardless of whether they became active participants in the litigation here [126] *By* the decree of this Court it was established that the Receiver was the owner as trustee for the benefit of the creditors of said defendant corporation of gross assets of the defendant corporation in states other than Arizona of $1,135,229.34.

That subsequent to the 30th day of November, 1935, physical possession of the assets of the defendant in the states of Utah, Idaho and Wyoming were delivered to ancillary receivers appointed in aid of the primary receivership in this Court, and are now being so administered. That the rights of these plaintiffs and those similarly situated, established by the decree of this court, has not yet been recognized by officials in the states of California and Oregon.

The total gross assets thus passing into the hands of the receiver as trustee for the plaintiffs and those similarly situated is $2,733,071.23.

In addition, there are choses in action against said M. E. Waddoups and other directors and officers of the defendant corporation from which

Petitioner Nealon's Exhibit No. 3—(Continued)

should be realized a further sum of, towit, $100,000.00, your petitioner having laid the foundation for this suit.

Your petitioner and his co-solicitor also laid the foundation for the suit against the Bonding Company bonding the officers for unlawful conduct of the officers and directors of said corporation, there having been a fidelity bond issued for that purpose, and the liability on said bond exceeding the sum of $50,000.00.

The solicitors for the plaintiffs also laid the foundation for a suit against Waddoups for the sequestration of his property, which suit is now pending in the state of Arizona in and for the County of Maricopa, and your petitioner and his co-solicitor also laid the foundation for a judgment subsequently obtained against M. E. Waddoups and others and by which there was [127] secured a lien upon certain of his properties held by him in the state of Arizona.

That had it not been for the services rendered by your petitioner and his co-solicitor, all of the assets of the defendant corporation would have been dissipated by the defendant corporation, its officers and directors, as shown by the record in this cause.

XXXIX.

NO COMPENSATION RECEIVED BY PETITIONER

That no contract or understanding now exists or was ever made or existed between your petitioner

Petitioner Nealon's Exhibit No. 3—(Continued)
and the plaintiffs or others similarly situated for compensation for his services, other than the agreement that in the event of a successful termination of the litigation he would accept such compensation as the Court should deem reasonable for his services, the same to be paid from the assets coming into the hands of the receiver of the defendant corporation should a receiver be appointed by this Court.

That the prevailing rates of compensation in this community to attorneys in cases where the fees are contingent on recovery range from twenty to thirty-five percent of recovery, depending upon difficulty of proof and hazard involved. That such is the rate of compensation these 2792 creditors who accepted the benefits of said decree, would probably have had to pay had they contracted individually for such services as were rendered by the solicitors for the plaintiffs in this cause.

That no application has heretofore been made by your petitioner for compensation for the services rendered to the plaintiffs or those similarly situated for the bringing of suit, or for the services rendered by your petitioner as described in this petition. [128]

XL.

EXPENSES INCURRED BY PETITIONER

That in the investigation, preparation and trial of said suit and on the appeals to the Circuit Court of Appeals and Supreme Court of the United

Petitioner Nealon's Exhibit No. 3—(Continued)

States, your petitioner has incurred the following expenses advanced by him, totaling the sum of $1,330.40, for which he seeks reimbursement:

Printing of appellee's brief, U. S. Circuit Court of Appeals	$ 297.90
Printing of Supplemental brief, U. S. Circuit Court of Appeals	48.80
Printing of Respondent's brief in Supreme Court of United States	73.93
Paid Brady & Atchison, attorneys at law, Salt Lake City, Utah, for legal services in connection with procuring records in Utah	25.00
Paid S. A. Nelligan for clerical work procuring copies of records in Utah	17.00
Paid for surety bonds required by Court	120.30
Arizona Corporation Commission, certified copies of records	9.00
United States Marshal, service of papers	16.20
County Recorder, certified copy of record	3.35
Clerk of District Court, Utah, certified copy of record	25.75
Larsen & Larsen, Court Reporters, copy testimony of Bruneau and Waddoups	8.00
Tucker & Morgan, court reporters	5.00
Photostatic copy of certificate	1.44
Clerk of District Court, certified copies orders	12.30
Judge J. H. Sundheim, copy of record	2.50
Sundry telegrams	14.57
Judge J. H. Sundheim, copy opinion 3rd Circuit Court of Appeals	6.18
Postage on briefs	12.23
Railroad fare and expenses (5 days) to San Francisco	64.95
Paul P. O'Brien, Clerk 9th CCA, copy of opinion	6.00
Expense stenographic service, pleadings, briefs, etc. (16 weeks @ $35	560.00
Total	$1330.40

Wherefore your petitioner prays that this Hon-

Petitioner Nealon's Exhibit No. 3—(Continued)

orable Court allow to your petitioner such sum as it deems reasonable compensation to him for his services rendered in connection with the preparation, institution and trial of said cause, including the services rendered by him on the appeal from the interlocutory decree rendered herein to the Ninth Circuit Court of Appeals and [129] for his services in opposing the petition of the defendant corporation and J. A. Malia to the Supreme Court of the United States for a writ of certiorari to review the proceedings in the District Court and Circuit Court of Appeals, such allowance to be on the basis of one-half of such sum as the Court may find to be a reasonable sum for all legal services rendered by the solicitors for the plaintiffs in the premises.

Your petitioner further prays that he be allowed the additional sum of $1,330.40 for out-of-pocket expenses necessarily incurred by him in the premises as hereinbefore set forth.

Your petitioner further prays that this Court establish and fix a lien upon the assets now in the hands of the Receiver of the Intermountain Building & Loan Association, an Utah corporation, for such allowance as it may make to your petitioner upon the foregoing petition for services rendered and expenses incurred, and that said Receiver be authorized and directed to pay the amount of such allowance to your petitioner from the funds of the receivership estate now in his possession, and that each of the 2,792 creditors of said Association who

Petitioner Nealon's Exhibit No. 3—(Continued)

have elected to accept the benefit of your petitioner's efforts, bear their proportion of such allowance; and that in the event this Court should deem it inadvisable at this time to pay to your petitioner the full amount which he would be entitled to for his services as solicitor for the plaintiffs in said proceeding, that this Court make an allowance to your petitioner for the amount of the out-of-pocket expenses incurred by him and an allowance upon account for the services rendered by him.

(Signed) THOMAS W. NEALON
Petitioner [130]

State of Arizona
County of Maricopa—ss.

Thomas W. Nealon being first duly sworn on oath deposes and says: That he is the petitioner above named; that he has read the foregoing petition, knows the contents thereof, and that the same are true, in substance and in fact.

(Signed) THOMAS W. NEALON

Subscribed and Sworn to before me this 14 day of October, 1937.

(Signed) W. F. DAINS
Notary Public

My Commission Expires: Oct. 28, 1938. [131]

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[132]

[Endorsed]: Filed Oct. 15, 1937, Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Helen Roach, Deputy Clerk.

[Endorsed]: Petr. Nealon's Exhibit No. 3. Submitted and Filed Dec. 20, 1937. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Wm. H. Loveless, Chief Deputy Clerk. Case No. E-268 Phx. Gallegos vs. Intermountain. [133]

PETITIONER NEALON'S EXHIBIT No. 4

[Title of District Court and Cause.]

DEPOSITION OF WILLIAM H. BURGES,

a witness on behalf of Thomas W. Nealon, Petitioner, in the above-entitled cause.

Pursuant to the notice hereunto annexed, the said William H. Burges appeared before me, Rose B. Greenawalt, a Notary Public in and for the County

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

of El Paso, State of Texas, at the office of Turney, Burges, Culwell & Pollard, 1100 First National Bank Building, El Paso, Texas, at 10:00 o'clock A.M., on the 14th day of December, 1937, and having been by me first duly sworn to testify the truth, the whole truth and nothing but the truth in the above entitled matter, testified as follows:

Direct Examination

By Mr. Nealon:

Q. State your name, please.

A. William H. Burges.

Q. What is your profession?

A. I am a lawyer.

Q. How long have you been practicing law?

A. Forty-eight years last June.

Q. What is your place of residence?

A. El Paso, Texas.

Q. You are a member of the bar of the Supreme Court of the United States? [134] A. Yes.

Q. And have practiced before that Court?

A. I have appeared on a number of briefs in that Court. I have not personally argued a case in the Supreme Court.

Q. You have practiced in the States of Arizona and California, tried cases there?

A. Yes, and New Mexico, Texas and Illinois.

Q. And before what Circuit Court of Appeals?

A. United States Circuit Court of Appeals for the Fifth Circuit, and United States Circuit Court of Appeals for the Seventh Circuit.

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

Q. What is the name of your law firm, Mr. Burges?

A. Turney, Burges, Culwell & Pollard.

Q. You have conducted suits, have you not, where the amounts involved were more than one million dollars? A. Oh, yes.

Q. Several of them? A. Several of them.

Q. Are you familiar with the fees prevailing in the States of Texas, Arizona and California?

A. In a general way in California and fairly well in Arizona and in this State very well.

Q. You know the Petitioner, Thomas W. Nealon? A. I do.

Q. How long have you known him?

A. Thirty-three or thirty-four years.

Q. Will you state your opinion as to his standing as an attorney?

A. His standing at the bar of the State at which he practices is as good as anybody else's. In my judgment he is a competent lawyer of high standing. According to my knowledge and belief he has had rather an extensive and successful practice for a number of years. [135]

In addition to your own knowledge and observation of the case assume the following:

I.

That Thomas W. Nealon was one of the solicitors for the plaintiffs in Cause No. E-268 Phoenix, in the District Court of the United States for the Fed-

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

eral District of Arizona, in a class suit in which Guadalupe R. Gallegos, Francisca Gallegos, his wife, Inga G. Gudmundsen and Mata E. Dexter, in their own behalf and in behalf of others similarly situated, were the plaintiffs and the Intermountain Building & Loan Association, a corporation, was defendant, and that said suit was brought by said named plaintiffs in their own behalf and in behalf of others similarly situated.

II.

That said Thomas W. Nealon has been since 1914 and now is a member of the Bar of the Supreme Court of Arizona and of the United States District Court in and for the Federal District of Arizona, and has been at all times since said date in active practice before the state courts of Arizona and the Federal Courts of the District of Arizona; That he is and has been for many years an active member of the State Bar of California and of the United States Circuit Court of Appeals for the Ninth Circuit; and that during all of said period a large portion of his practice has been upon the equity side of the Federal Court.

III.

Assume that many months prior to April 18, 1933, he was employed by certain lienholding creditors of the Intermountain Building and Loan Association, an Utah corporation, to file suits against said corporation and establish equitable liens by

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

court decree to recover trust property from the delinquent corporation and procure the appointment of a receiver to preserve and conserve the assets of said corporation then being wasted and dissipated [136] by said corporation, its officers and directors; that the plaintiffs named in said suit were among the lienholding creditors who employed said Thomas W. Nealon to institute said suit, and said suit was filed on April 18, 1933 in behalf of said creditors and all others similarly situated, the persons so situated being too numerous to be made parties to the suit, the bill of complaint containing the following paragraph:

> "That the plaintiffs bring this action on behalf of themselves and for all other similarly situated who desire to come in and bear their proportion of the expenses of this suit; that the persons so situated are too numerous to be made parties to this action."

IV.

Assume that said Thomas W. Nealon immediately upon being employed as aforesaid, began an investigation of the affairs of said corporation, searching all available sources of information to ascertain the financial condition of said corporation, the nature and extent of its assets and liabilities, the conduct of its officers and directors, as well as a study of the law applicable to the existing situation, and that in the course of this investigation he discovered the following:

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

1. That the business of the Intermountain Building & Loan Association, an Utah corporation, was being conducted in a manner that would ultimately result in the waste and dissipation of all of the assets of the corporation, and that the corporation had been insolvent from about the year 1922, if not before that date, and that it is was not a true building and loan association but a fraudulent corporation.

2. That some 3,840 were creditors of said Association at that time; that the bulk of these creditors were people of limited means, among them widows, orphans, guardians and old people, endeavoring to safely invest $5.50 per month and thus in the course of ten and one half years accumulate $1,000.00; that they possessed but limited business experience which was not [137] sufficient to enable them to analyze the complicated corporate structure of the defendant corporation and they were influenced in making their investments by plausible propaganda presented by the corporation through newspaper articles, circulars and printed matter, as well as by high pressure salesmen; that in the contract itself it was specifically provided that the corporation should hold in trust for each of the plaintiffs and those similarly situated real estate mortgages in the amount of 100% of the amount due to each of them, and that these securities in the trust fund should be subject to the constant inspection of the banking officials of Utah or of the state

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

in which the creditor resided, the contract containing the following provision:

> "Security. As security for the performance of the obligations of the association hereunder, the Association will hold intact, subject to the constant examination and inspection of the banking department of the State of Utah, first mortgages on improved Real Estate in an amount equal to at least one hundred percent of its liabilities hereunder, less the amount of any loans made on this and like certificates or any certificates issued in lieu thereof."

3. The investigation disclosed many wrongful acts committed by the Intermountain Building & Loan Association, an Utah corporation, resulting in the waste and dissipation of its assets and of the trust funds entrusted to it, and which caused the insolvency of the corporation, some of which were as follows:

During a period of 3½ years there had been unlawfully paid to one M. E. Waddoups as commission on the sale of securities of the said corporation (in many instances he receiving all that was paid into the corporation by the lender) the sum of	$ 482,886.00
Dividends had been paid to said Waddoups and his associates that were never earned by the said corporation and which were wrongfully paid from the trust fund belonging to the plaintiffs and others similarly situated, amounting to	418,649.50

Petitioner Nealon's Exhibit No. 4—(Cont.)

(Deposition of William H. Burges.)

Loans had been improvidently made, a large percentage of which were made in violation of the Articles of Incorporation and By-Laws of the Association, resulting in the loss of	765,182.78
The total loss on these three items alone amount to	$1,666,718.28

[138]

4. That an exorbitant and fictitious salary, the amount being impossible to estimate, was being paid to said Waddoups as president of said corporation, and had been during a long period of time upon a basis of $24,000.00 per year, approximately 45% of which came from the trust fund belonging to the plaintiffs named and those similarly situated, and which were paid in violation of the Articles of Incorporation and By-Laws of the Association while said Waddoups devoted only a part of his time to the business of said Intermountain Building & Loan Association.

5. That said M. E. Waddoups had dominated and controlled said corporation absolutely from the time of its organization in Utah in 1921 until his stock therein was purchased by one Daniel Alexander, in, towit, October of 1924, and that upon losing control of said corporation he moved from Salt Lake City, Utah, to Phoenix, Arizona, where he organized the First National Building & Loan Association, and through said latter corporation obtained control of the said Intermountain Building

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

& Loan Association in towit, August of 1930, and that at all times subsequent to that date up to the time of the appointment of the receiver herein by the United States District Court he retained such control and manipulated its affairs for the benefit of himself and to the injury of the plaintiffs named and those similarly situated.

6. That said Waddoups was using the funds of the said Association to finance the operations of the Lincoln Mortgage Company, a company largely owned and absolutely dominated by him, and the Association suffered extreme losses through the manipulation of loans made upon buildings erected by said Lincoln Mortgage Company.

7. That prior to the organization of the Association said Waddoups had entered into a secret contract with one Daniel [139] Alexander, in which it was agreed that said Alexander should be elected President of said Association, that Waddoups should not be an officer, but should receive a large commission upon all contracts issued by the corporation of similar tenor to those held by the plaintiffs, and that they were to divide these profits derived from this transaction; that Alexander had sued Waddoups for his portion under such agreement, and that Waddoups had settled said suit before it came to trial.

8. That losses of an extremely large amount, the actual figures of which cannot be obtained, were suffered by the corporation through the negligence

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

of its officers and directors in permitting taxes to accumulate on property which they held mortgages (some as long as ten years), and in some cases the amount of the delinquent taxes amounted to more than the value of the property. As a result of this negligence many properties were lost through tax sales, and other properties necessarily have to be abandoned; nor did these officers and directors of the corporation take any steps in court necessary to secure the payment of such taxes from the rental value of the property.

9. That in the year 1931 alone unlawful dividends paid to the president of the Association and his associates amounted to some $119,312.68; that during the same period, expenses, salaries, costs of collection and other items ran the expense up to $218,-718.79, a sum greater than could have been collected from the interest of all of the mortgages held by the corporation and the rents from all the properties owned by the corporation; that the losses of the corporation during that period alone was probably in excess of $240,000.00.

10. That the Association had paid large sums of money to withdrawing certificate holders while it was insolvent, with the result that some of such holders had been paid in full while [140] the plaintiffs named and those similarly situated would receive under any circumstances only a portion of the money due them.

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

11. That the Association had and was continuing to transfer many of its assets to other corporations.

12. That the Association was not functioning for the purposes for which it was incorporated, that it was doing practically no new business or any profitable business and that it had lost the confidence of the public to such an extent that it could never be profitably conducted, and had lost all rights to do any new business in Arizona.

13. The investigation disclosed that the conduct of the officers and directors of the Association had been such that at the time the suit was filed, the liabilities of the corporation exceeded its assets by more than $700,000.00, and that the corporation was hopelessly insolvent and had been so since 1922; that its paid-in capital never exceeded $3,460.00, and this was exhausted before 1922, and from that time on it traveled on money borrowed from its creditors.

14. That the true state of the affairs of the corporation was concealed from the creditors and the public by the fact that the total liabilities upon obligations like those held by the plaintiffs named and those similarly situated never appeared upon the books of the corporation, and further by the fact that thousands of these obligations had been written off on the records of the corporation as if they had been forfeited, there being no authority of law whatsoever upon the part

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

of the corporation and its officers so to do. As a result thereof there were hundreds of the creditors of said corporation who were entitled to participate in this trust fund whose rights had been totally lost. A large portion of the funds so "forfeited" was absorbed by said Waddoups and his associates through a particular form of stock called "expense fund stock", although said funds belonged in a [141] trust fund for the purpose of protecting those who had furnished money to buy the securities.

15. The officers and directors of the corporation also sent large sums of money out of the state for the purpose of giving a preference to residents of other states in the matter of the payment of claims similar to those of the plaintiffs named and those similarly situated; that among these sums so taken $40,000.00 was sent to California in 1929 and $50,000.00 in 1932, which sums were invested in securities that are now held in California, and that there was a similar attempt to give a preference to residents of Oregon and Wyoming, all in violation of the rights conferred upon the plaintiffs and those similarly situated.

16. The officers and directors of the Association also published in newspapers and circulars false reports that the said corporation and five other building and loan associations, known as the Intermountain Building & Loan Group, which was dominated by the said M. E. Waddoups, had a

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

capital and surplus in excess of $8,000,000.00, at a time when each of these associations were insolvent and when approximately 45% of this amount represented liabilities of the defendant corporation, these reports being made with the intent of securing further contributions from persons situated as were the plaintiffs named in the suit filed and inducing the public to invest its money with the corporation by such false representations.

17. That the contracts between the corporation and its creditors disclosed that the corporation was promising to pay such creditors interest at the rate of 8.84% per annum and that Waddoups and others received commissions of from three to seven percent for obtaining the funds represented by these contracts. These ran the total cost of the money borrowed to the sum of $67.40 per year for each $663.00, or a fraction more than 10%. [142] The bulk of the loans, in Arizona at least, were made upon a basis of 8%. The total income therefore which the corporation received from its loans was not sufficient to pay the interest upon the money it had borrowed, and consequently there was no income with which to pay the expenses of doing business, and the corporation was becoming further insolvent each year to the full measure of the expenses incurred by it.

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

V

Assume that the corporation was charged by law with the duty of filing reports showing its financial condition with the Banking Department of the state of Utah, and did make such purported reports each year for the years 1921 to and including 1932; that although the contracts issued to the plaintiffs named in said suit and those similarly situated provided that the funds of said Association should be invested in first mortgages on improved real estate in an amount equal to at least 100% of its liabilities thereon and that the mortgages should be at all times subject to the constant examination and inspection of the Banking Department of Utah, and although the Banking Department of Utah was empowered to make complete examinations of the affairs of said Association, and did make numerous investigations thereof, and although by these reports and these examinations the said Bank Commissioner was fully informed, or by reasonable diligence could have been informed of the unsafe and unsound condition of the said corporation and the misconduct of its officers in declaring dividends from trust funds and other misconduct and neglect of its officers, and the insolvency of the corporation during all of the period from 1922 to 1932, the Bank Commissioner of Utah, with all this information before him and all these resources at his command, failed, refused and neglected to take any steps for

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)
the protection of the plaintiffs named and those similarly situated. [143]

VI

Assume that during the course of his investigation of the affairs of said corporation, said Thomas W. Nealon received information from reliable sources that the corporation was planning to remove all of its personal property, including promissory notes and mortgages, and its books and records, out of the State of Arizona and out of the jurisdiction of this Court, so as to render it practically impossible for the plaintiffs named and those similarly situated to protect their rights and to force them to go to a foreign jurisdiction in search of redress which could have only been procured at a prohibitive cost and then only by actions similar to that which were taken by said Thomas W. Nealon on behalf of the parties interested; that he was also informed that the corporation had made settlements with plaintiffs in suits that were pending at the time in the state courts, so that the court would release the assets of said Intermountain Building & Loan Association from its control in order that these assets could be removed from the state of Arizona; and that in order to prevent such removal of the assets of said corporation from the jurisdiction of the United States District Court, said Thomas W. Nealon did on the 27th day of June, 1932, in-

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

stitute such proceedings on behalf of the creditors of said corporation in the Superior Court of Arizona, in and for the County of Maricopa, as resulted in the prevention of the removal of the personal property of the said corporation from Arizona and thus preserved for the benefit of the plaintiffs in this cause and those similarly situated such assets and records, which would otherwise have been lost; that in these proceedings in the state court, he was opposed by many eminent members of the Arizona Bar, including Messrs. John L. Gust, Charles B. Ward, Alexander B. Baker, Louis B. Whitney and L. L. Howe. [144]

VII

Assume that it was obvious from the investigations made by said Thomas W. Nealon that if a court of equity did not restrain the waste, mismanagement, misapplication of funds and the dissipation of the assets of said corporation, that all of the assets would be dissipated in a short time, and every investor in said Association would lose every dollar they had put in, and that the only way this could be prevented was for the United States District Court to take constructive possession of such assets and appoint some reliable person of its own selection to husband the dwindling assets of the corporation for the benefit of the creditors of the Association; and that on the 18th day of April, 1933, said Thomas W. Nealon, to-

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

gether with Elizabeth G. Monaghan, caused to be filed in said United States District Court for the District of Arizona a suit in equity for the purpose of recovering the trust fund herein described and conserving the assets of said corporation, having a receiver appointed for that purpose and obtaining a*n* restraining order and injunction to prevent the disposition or removal of such assets pending suit. That said suit was not filed until the insolvency of the corporation and the misconduct of its officers had become widely known in the City of Phoenix, as well as the waste of its assets, and also that the First National Building & Loan Association which held the corporate control of the said corporation and dominated its affairs, had also become widely known to be insolvent, and said suit was not filed until it was apparent to anyone who examined into the affairs of the said corporation that this was the only method available of preventing the further dissipation of the assets, misapplication of funds and waste of the fast dwindling remnant of such assets. [145]

VIII

Assume that said Thomas W. Nealon made an intensive study of the law applicable to the facts ascertained through his investigation, and based the said complaint upon the theory that the plaintiffs named and those similarly situated were en-

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

titled to equitable relief, and prayed for such relief upon the following theory:

That a federal district court has equitable jurisdiction to entertain a class suit when one of the complainants is a creditor holding a claim in excess of $3,000.00 secured by an equitable lien; that no state can by statute or otherwise deprive a federal court of its jurisdiction or limit that jurisdiction in any particular;

That the contracts entered into between the defendant corporation and the plaintiffs and those similarly situated, created equitable liens in favor of the latter and created the relation of debtor and creditor between the parties to such contracts; that a federal court of equity at the instance of lien-holding creditors has jurisdiction to appoint a receiver for the assets of a building and loan association incorporated in a state other than that in which the court is sitting, when the jurisdictional facts exist and justify the granting of equitable relief, and as an incident thereof the appointment of a receiver when the association is doing business in the state where the court is sitting;

That equal protection of the law is granted to each and every creditor of a corporation regardless of his residence or citizenship, and no state can by statute give a preference to its own citizens or residents over those of any other state;

That when a federal court of equity obtains jurisdiction over a corporation by means of a

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

sufficient bill of complaint and personal service upon the corporation, or its authorized [146] agents, such court has the power to compel such corporation to execute deeds and other convenyances to real or personal property in the states where the property is situated when the property involved is a trust property and the conduct of the corporate trustee has been such as to justify its removal and the appointment of a receiver to take possession of its assets;

That the police powers of a state do not extend beyond its physical boundaries and state officers as such cannot exercise any of their delegated powers outside of such state except that, where the statutes of that state vest title to the assets of a delinquent corporation in such officer and proper steps have been taken to wind up the affairs of such delinquent corporation, the statutory receiver may be vested with title to the property actually owned by the corporation wherever situated;

That the articles of incorporation of the defendant corporation and the statutes of Utah vested said defendant corporation with the power to borrow money and pledge its property to secure the payment of its obligations; that the statutes of Utah did not vest its bank commissioner with title to the assets of a defunct building and loan association;

That the defendant corporation was insolvent and its liabilities exceeded its assets by more than

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

$500,000; that its affairs had been mismanaged by its officers and directors who had wasted its assets for eleven years, had paid dividends amounting to hundreds of thousands of dollars to themselves when the corporation was insolvent, the payments being made from funds rightfully belonging to the complainants and those similarly situated; that its expenses exceeded its earnings in 1932 by more than $70,000; that it paid extravagant salaries for nominal services; that its liabilities were falsely stated upon its books; that it made false statements in its published statements and advertisements in order to obtain money from complainants and [147] those similarly situated; that all of its properties were being wasted to such an extent that there would be no funds left to pay anything to complainants and those similarly situated and their claims would be a total loss unless the United States District Court took complete charge of its affairs and salvaged the same for the benefit of its creditors;

That with records in his office revealing this state of the corporation's affairs, the Bank Commissioner of Utah permitted the officers and directors of the corporation to mismanage the affairs of the corporation, waste and absorb its assets, misapply its trust funds, obtain fresh loans from the public by false representations as to its financial condition, and took no steps to correct this condition, and although the Bank Commissioner

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

had accepted the trust to constantly inspect the trust fund which the corporation had agreed to set aside for the protection of the complainants named and those similarly situated; he never at any time, or at all, took any steps to protect such fund or the persons who were being defrauded;

That the state officers of California, Oregon, Idaho and Wyoming were guilty of a like dereliction of duty in permitting such trust funds to be misapplied and wasted and dissipated, although they made repeated examinations of the affairs of the corporation, which if properly conducted would have revealed the truth;

That an imperative necessity existed for the appointment of a receiver if the complainants named and those similarly situated were to recover a single dollar of the money they had loaned to the corporation on the faith of their contracts by which the corporation had agreed to hold these assets in trust subject to the constant examination and inspection of the banking department of the state of Utah to secure such loans, and that [148] no other adequate remedy existed for the protection of these creditors other than the one pursued in this proceeding.

IX.

Assume that process was duly issued in said suit and service had upon the defendant, and that a restraining order was immediately issued against

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

the defendant restraining the defendant corporation from disposing of its assets and from removing, destroying or concealing its books, records, files, documents and other property of the corporation then in the state of Arizona.

X.

Assume that the defendant corporation vigorously resisted the suit of the plaintiffs, employing Messrs. Charles B. Ward, R. G. Langmade, Charles L. Rawlins and George H. Rawlins, all outstanding members of the Bar of the United States District Court as their solicitors to defend the said suit; that they filed various dilatory motions in which they sought to have the restraining order modified and vacated and attacked the complaint, particularly upon the ground of lack of jurisdiction of the United States District Court for the Federal District of Arizona and upon the ground of failure to state sufficient facts to entitle the complainants to any relief; that said solicitors were well versed in federal equity practice and ably presented the contentions of the defendant corporation; that they denied the right of said Court to give the necessary protection to the plaintiffs named and those similarly situated, not only upon the facts of the case but upon the law as well, and further contended:

That the United States District Court for the Federal District of Arizona had no jurisdiction to appoint a receiver for said corporation; that

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

the sole right to liquidate the assets of the corporation was in the Bank Commissioner of the State of Utah, the corporation having been organized under the laws of [149] that state; that the appointment of a receiver would be an abuse of discretion by the court and would result in the acceleration of the due date of all mortgages held by it and would thus work a great injustice to the mortgagors; that the facts alleged in the bill of complaint did not justify the issuance of a restraining order or an injunction, or the appointment of a receiver; that the plaintiffs were not creditors but stockholders; that the plaintiffs' contracts did not create a lien in their favor;

That plaintiffs were not entitled to withdraw funds or demand the payment of their certificates, basing this contention upon the ground that they had failed and neglected to carry out their contracts with the defendant corporation and that the corporation had kept and performed its contracts with the plaintiffs according to the conditions therein and the by-laws of the association, which the defendant corporation alleged specifically provided that not more than one half of the fund received by the Association in any one month should be applicable to the payment of withdrawing members and that withdrawals should be paid in rotation according to priority of notice, and that there were other stockholders of the Association who had applied prior in time to the filing

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

of the application of plaintiffs who had not been paid in rotation or whose turn for payment had not been reached for the reason that sufficient funds of the Association had not been received applicable to the payment of claims of withdrawing members, and contended further that under the laws of Utah not more than one half of the monthly receipts in any one month might be applied to the withdrawals for the month without the consent of the board of directors of the corporation.

The defendant corporation also denied insolvency, mismanagement, waste of assets, and other material allegations [150] of the complaint, and supported their contentions by briefs and oral argument of able counsel for defendant.

XI

Assume that said Thomas W. Nealon and his co-solicitor met the contentions of the defendant by extensive briefs and oral arguments, contending that:

The court had jurisdiction to appoint a receiver of a foreign corporation at the instance of creditors where fraud and insolvency were involved; that the Bank Commissioner of Utah was appointed under the police power of that state and the police power did not extend beyond the territorial jurisdiction of that state;

That the mortgages held by the corporation were straight mortgages that provided a definite term

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

of payment and were not mortgages of such a character whose due date would be accelerated by the failure of the corporation; that the facts alleged, namely insolvency, mismanagement and dissipation of the assets were sufficient grounds for the relief sought and were fully supported by affidavits filed in this proceeding;

That the plaintiffs were not stockholders but creditors; that the contracts created equitable liens and a trust of which the federal courts of equity could and would take jurisdiction; that under defendant's construction of the contracts, the obligations to plaintiffs and those similarly situated would never be payable and that such construction would be a fraud upon such creditors;

That the verified complaint showing insolvency and the affidavits filed in support thereof made a prima facie case which could only be refuted by a showing of solvency, the production of the books and records of the corporation and a complete disclosure of the truth of its condition in the pleadings of the defendant corporation. [151]

XII.

Assume that upon the hearing of the petition for the appointment of the receiver and upon the motion of defendant to modify the restraining order, Thomas W. Nealon, being unable to be present, was represented by Joseph M. Nealon, a member of the bar of 32 years experience, now Chief Justice of the Court

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

of Civil Appeals of the Eighth Supreme Judicial District of Texas, and who at this particular time was of counsel for the trustee in bankruptcy of the Bay Cities Building & Loan Association in the Federal Courts of Los Angeles, California, in which work he had become familiar with the issues involved in this litigation, and said Joseph M. Nealon later assisted said Thomas W. Nealon by furnishing him with briefs and authorities which were of considerable service in the further presentation of the issues involved.

XIII.

Assume that after various oral arguments and the filing of briefs going to the question of law raised by the motions and demurrers of the defendant, and while the court had the same under consideration, but before the Court had given its decision in the matter, J. A. Malia, then Bank Commissioner of the state of Utah, did, on the 26th day of September, 1933, file a petition for leave to intervene in this proceedings for the purpose of having the books, records and movable assets of the corporation removed to the state of Utah, upon the alleged ground that he could have closer supervision over the affairs of the corporation, he alleging in his motion or petition for leave to intervene that the defendant corporation had since 1921 conducted a successful building and loan business. This allegation was made notwithstanding the fact that he then had in his possession full information in the records of his office of the insolvency of

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

the corporation and mismanagement of its affairs, and [152] notwithstanding the fact that he had notice for months previously of the filing of this suit and of the filing of the affidavits in connection therewith which directly called to his attention the true condition of the defendant corporation.

He further alleged that the corporation being a Utah corporation, he was vested with exclusive jurisdiction over the affairs of the defendant to the exclusion of the United States Court for the Federal District of Arizona or any other court, and prayed for an order of the court permitting him to file his complaint in intervention and to be forthwith entered as intervenor in said action, and for other and further general relief. The purpose of said intervention was to divest the United States Court for the Federal District of Arizona of all control of the assets of the defendant corporation which were then in the constructive possession of said Court, and to remove such assets beyond the jurisdiction of said court. The petition was verified by D. M. Draper, a member of the Bar of the State of Utah and assistant attorney general of that state, and he represented said Malia as Bank Commissioner in presenting said petition to the Court.

XIV.

Assume that upon the presentation of the petition of said Malia, said Thomas W. Nealon strongly opposed the same and alleged that there had been no compliance with the Federal equity rules governing

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

intervention, and among other points, alleging that the jurisdiction of the court in the premises had not been admitted as required by such rule. The Court sustained the position of said Thomas W. Nealon and refused to recognize the intervention by Malia. Thereupon an application was then made to the Court to allow Mr. Draper to appear as counsel pro hac vice for the defendant corporation and he then associated himself with the other counsel representing the defendant cor- [153] poration as one of counsel for the defendant resisting the complaint of the plaintiffs.

XV.

Assume that Mr. Draper argued strongly and ably against the right of the Court to appoint a receiver, as against the wishes of the Bank Commissioner of Utah, and the Court granted Mr. Draper further time to amend his petition or show any right to intervene in the proceedings; that after the hearing on September 26, 1933, towit on October 3, 1933, the solicitors for the plaintiffs filed formal written motions to dismiss the petition of Malia for leave to intervene and supported the same by points and authorities, which were duly served upon said Malia as well as upon the defendant; that the Bank Commissioner did not avail himself of the opportunity granted him by the Court to amend his petition to intervene, and that on the 3rd day of January, 1934, his petition was dismissed.

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

XVI.

Assume that after due consideration by the Court on the various briefs and oral arguments made, the Court denied defendant's motions and overruled their demurrers, thus settling all the law questions; that the cause then awaited the convenience of the Court for the purpose of setting a date for the hearing of the cause.

XVII.

Assume that this was the situation that existed a few days prior to the 17th day of March, 1934, when said J. A. Malia, with the consent and acquiescence of M. E. Waddoups took possession of the assets of the defendant corporation (which was then in the physical possession of the corporation), notwithstanding the constructive possession of said assets was in said Court; that A. J. Bruneau, secretary and general manager of the defendant corporation protested the seizure of these [154] assets without the Court's consent, but without avail; that Malia also attempted to secure possession of the moneys of the corporation deposited in the Valley National Bank of Phoenix and the Phoenix National Bank, but that each of these institutions refused to turn over possession of such funds to him; that following this refusal Malia then appeared in the United States District Court and filed an amended petition for leave to intervene as Bank Commissioner of the State of Utah, on March 23, 1934, seeking to procure an order from said Court disclaiming any right to appoint a re-

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

ceiver or take possession of the assets of the defendant and sought an order that would destroy the force and effect of the restraining order issued by the court on April 18, 1933, which was still in effect, he being represented at this time by Messrs. Moore & Shimmel, eminent attorneys of Phoenix; that Malia based his right to intervene upon the allegation that he had theretofore, on, towit, March 17, 1934, seized the assets of the defendant corporation in Utah and that he had prior to the time of the filing of said petition procured an order from the state district court in Utah authorizing him to take possession of all of the assets of the corporation, and that he claimed title to the assets upon the theory that he was so vested by the terms of the Utah statutes.

XVIII.

Assume that Thomas W. Nealon and his co-solicitor vigorously opposed the contention of the Bank Commissioner of Utah and filed a pettition for the immediate appointment of a receiver and procured an order to show cause thereon; that they alleged that said Malia had failed, neglected and refused theretofore to take action to protect the investors in said Association, although he was fully informed, or by reasonable diligence could have been informed of the unsafe and unsound condition of the defendant corporation and that with all this [155] information before him, he did on the 26th day of September, 1933, assert in a written pleading filed in said Court that

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

the defendant corporation "since 1921 had conducted a successful building and loan business throughout the several states of the Union under the supervision of the Bank Commissioner of the state of Utah", and also alleged that from the records and files in the cause it appeared that he was negligent in his supervision of the affairs of the corporation and lacked the qualities necessary to a proper administration of its affairs, and that he had for a long period of time suffered said corporation to continue business in an unsafe and unsound condition when he had access to their records and could have by the use of ordinary diligence discovered the condition of its affairs.

XIX.

Assume that the defendant corporation and Malia filed an answer and objections to this petition of plaintiffs for the immediate appointment of a receiver and strenuously fought the granting of the petition in the premises, and that in these proceedings Malia was further represented by the members of the Bar of Salt Lake City, Messrs. H. Van Dam and H. L. Mulliner, in addition to said Messrs. Moore & Shimmel.

XX.

Assume that the issues were heard by the Court on the 10th day of April, 1934, at which time evidence was introduced and exhaustive arguments made, and that from the bench the Court made the following order:

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

> "I will enter an order of record in this case at this time directing Mr. Malia to leave all the papers and records and files and the property of the Building and Loan Association in the state of Arizona and not remove them. That goes to all assets, books, records, files, money and everything else that belongs to this association; that they do not be removed from this state. That order is in effect until this matter is disposed of or until further order of the Court;"

and that the cause was ordered submitted on briefs, and said [156] Thomas W. Nealon was directed to prepare a brief upon the particular point involved as to the rights of the Bank Commissioner in Utah in the premises, and that this was the first occasion in the history of the law, so far as he is informed, in which the question of the unfitness of a state official to adminster the assets of a delinquent corporation had been raised as a ground for the appointment of a receiver, and proved an important question in the subsequent conduct of the litigation.

XXI.

Assume that on the 20th day of April, 1934, the Court granted the petition of plaintiffs for the appointment of a receiver pendente lite, appointing Hon. Henry S. McCluskey as such receiver, and continued in force the injunction and restraining order theretofore entered by it; and that the receiver qualified on the date of his appointment and demanded

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

possession of the assets, but that his demand was refused.

XXII.

Assume that immediately upon the entering of the interlocutory decree appointing Henry S. McCloskey, Receiver, notice of appeal was given by the defendant corporation and J. A. Malia, Bank Commissioner of Utah, which appeal was granted by the court and supersedeas bond fixed in the sum of $35,000.00; and that James R. Moore, solicitor for the proposed appellees, together with said Thomas W. Nealon then appeared before the Honorable Fred C. Jacobs, the judge who tried the cause, and settled the statement of evidence and the appeal was duly perfected.

XXIII.

Assume that in June of 1934 and before the case was at issue in the Circuit Court of Appeals the defendant corporation filed a motion for modification of the injunctive order made by the United States District Court for the Federal District of Arizona, and also filed a brief therewith. Assume that this [157] was opposed by Thomas W. Nealon and his co-solicitor, who filed an answer and brief thereto; and that the Circuit Court of Appeals denied this motion of the defendant corporation.

XXIV.

Assume that the appellants filed their brief on appeal in due season contending that the appellees were

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

stockholders (the certificates labeled them as such); that the bill of complaint was without equity; that the court abused its discretion in appointing a receiver; that the appellees had no lien upon the assets of the corporation; that the Bank Commissioner of Utah was the statutory liquidator and vested with title of the Association's assets, and that under the full faith and credit clause of the Constitution the court was bound to recognize the title of the Bank Commissioner of Utah to the assets of the corporation; that the court will not appoint a receiver at the suit of an unsecured, nonjudgment creditor, and that the court should not interfere with the internal affairs of a foreign corporation.

XXV.

Assume that Thomas W. Nealon and his co-solicitor filed their answering brief thereto within the time required by law contending:

That the labeling of the certificate as stock did not make it such, and the instrument itself created the relation of debtor and creditor between the contracting parties; that the facts stated in the complaint showed appellee's right to equitable relief and that they were holding equitable liens and that the defendant was false to its trust; that the facts presented to the court by the verified petition of plaintiffs, and otherwise, were such as to require it to grant the injunctive relief and appoint a receiver; that the contracts between appellants and appellees created equitable liens in favor of appellees and the [158] as-

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

sets of the corporation were a trust fund to secure the repayment of the money borrowed from the appellees and those similarly situated; that the Bank Commissioner of Utah was not vested with title to the assets of the corporation; that the appointment of a receiver is an ancillary remedy which a federal court of equity will grant to a lienholding creditor in a proper case; that the appellees and those similarly situated being creditors and not stockholders the issue was not one of internal management but the right of creditors to prevent the waste of a trust fund; that Malia had no rights in the premises, but if he ever had any he had lost same by his negligence and failure to protect the rights of all lienholding creditors, he having ample information in his own office of the wrongful conduct of the defendant corporation and its insolvency.

XXVI.

Assume that while this matter was at issue in the Circuit Court of Appeals the Supreme Court of the United States on the 4th day of February, 1935, handed down four decisions involving the rights of statutory liquidators, and that the appellants thereupon filed a supplemental brief in the Circuit Court of Appeals based upon the theory that these decision required a reversal of the decree rendered in the District Court. In opposition to this contention said Thomas W. Nealon and his co-solicitor filed their supplemental brief.

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

XXVII.

Assume that the cause was argued at San Francisco on the 28th day of February, 1935, by Thomas W. Nealon, his co-solicitor being present in Court on that occasion; that the matter was taken under advisement and on the 5th day of August, 1935, the Circuit Court of Appeals rendered its decision in which it affirmed the interlocutory decree of the United States District Court appointing Henry S. McCluskey as receiver and issuing an [159] an injunction pertaining to the assets of the corporation, and in its opinion the Circuit Court of Appeals said that the Court below "might well have arrived at the conclusion that the corporate chaos had been a matter of years, rather than months, and that therefore the Bank Commissioner of Utah in whose office admittedly there were filed reports containing 'full information as to the status of the defendant corporation', had shown himself not to be a proper person to husband the dwindling assets of the failing Association."

XXVIII.

Assume that the appellants thereupon filed motion for the purpose of having certain papers in the District Court sent up to the Circuit Court of Appeals; that this motion was opposed by Thomas W. Nealon and his co-solicitor, and that certiorari therefor was subsequently denied.

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

XXIX.

Assume that the appellants then filed their motion for rehearing and this was also denied; that they thereupon filed their petition for writ of certiorari in the Supreme Court of the United States and their briefs thereon, in which they made the contentions that the Circuit Court of Appeals had denied full faith and credit to the statutes of Utah and decided a federal question in conflict with the decision of the United States Supreme Court in the case of Clark v. Williard, 292 U.S. 112 and 294 U.S. 211; and that in affirming the decision of the District Court appointing a receiver and displacing the Bank Commissioner of Utah, its decision was contrary to the four decisions hereinbefore mentioned which involved the rights of statutory liquidators and which had been rendered while this case was at issue in the Circuit Court of Appeals.

XXX.

Assume that Thomas W. Nealon and his co-solicitor filed [160] their opposing briefs, contending that the decision of the Circuit Court of Appeals was not in conflict with the cases cited, that no federal question or other question of public importance which had not theretofore been settled by the Supreme Court was involved, and that there was no departure from the accepted and usual course of judicial proceedings in the court's decree. The petition for writ of certiorari was denied by the Supreme Court on November 11, 1935.

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

XXXI.

Assume that on the 29th day of September, 1936, the suit was tried upon the merits, Thomas W. Nealon and Elizabeth G. Monaghan appearing for the plaintiffs, and James R. Moore, Esq., of the firm of Moore & Shimmel appearing for the defendant; that after hearing the evidence the Court directed that findings of fact and conclusions of law be prepared by counsel for plaintiffs and that decree be entered for the plaintiffs.

XXXII.

Assume that on towit, the 5th day of January, 1937, the District Court of the United States for the District of Arizona made its decree in which it among other things, established the liens of the creditors, affirmed the appointment of Henry S. McCluskey as receiver, and made the injunction theretofore rendered permanent, thereby establishing the rights of said lienholding creditors who desired to come in and obtain the benefits of the judgment upon the conditions named in the invitation contained in the complaint, namely, that they should bear their proportionate share of the expenses of the litigation, including attorneys' fees; that said decree further secured the trust fund wherever situated to the plaintiffs named in said suit and those similarly situated, said decree providing and ordering that deeds and other conveyances to the property of the corporation wherever situated should be executed by the corporation

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

[161] to the receiver as trustee for the benefit of all these parties, said decree having been obtained after personal service and appearance by the corporation; that this provision was made for the reason that a receiver appointed by a United States court is not vested with title, but such court has power to compel the defendant to execute deeds and conveyances to its property wherever situated when the same is trust property; that such decree is binding upon all situated similarly to the named plaintiffs, regardless of any active participation in the suit.

XXXIII.

Assume that the burden of the conduct of this litigation as described herein and the other proceedings in connection with the recovery and preservation of the trust funds fell upon said Thomas W. Nealon, as well as the investigations and research work necessary to the successful conduct of such litigation; that the labor was arduous and difficult, the results of the litigation by no means certain and the hazard great;

That he had great difficulty in procuring the evidence to establish the facts for the reason that the books and records were in the exclusive possession of the officers, directors and employees of the defendant corporation, who, as well as their attorneys, refused access thereto to your petitioner and his associate solicitor, and were hostile to the plaintiff, and that it

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

thus became necessary for him to obtain his information from indirect sources.

That this necessitated an examination of the records of the Arizona Corporation Commission and the Arizona Banking Department, so far as they pertained to the affairs of this corporation; investigation into the records of the state courts in foreclosure proceedings and other litigation in which the defendant corporation was involved; interviews with other [162] attorneys who had claims against the defendant and allied corporations; procuring advertising matter and printed statements of the corporation as far as they could be obtained by diligent search;

That he attended upon trials in the state courts where proceedings were pending against the corporation which held the corporate control of the defendant, so that he might obtain the evidence necessary to establish the allegations of the complaint of the plaintiffs; that he also had interviews with representatives of the federal government who had come to his office in search of evidence against said M. E. Waddoups, and who in turn furnished him with valuable information.

That it was necessary to employ clerical help in order to obtain copies of the reports of said Association filed in the office of the Bank Commissioner of Utah annually from the year 1921 up to and including the year 1932, and it was necessary to employ certified public accountants to work with him and his

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

co-solicitor in order to break down and analyze these reports for the purpose of obtaining the evidence therefrom to establish the insolvency of the corporation material to the controversy and to establish the fraud and mismanagement of its directors, as well as the negligence of the Bank Commissioner in permitting the corporation to do business when by the reports on file in his office and an examination of the affairs of the corporation, he knew, or could have known by the use of ordinary diligence, the insolvency of said corporation; that he sent for and obtained the records of the suit filed by Daniel Alexander against M. E. Waddoups hereinbefore mentioned, in which was disclosed the secret contracts under which the unlawful commissions to the amount of several hundred thousand dollars had been unlawfully paid to Waddoups; that the proof of the insolvency of the defendant corporation and the misconduct of its officer had to [163] *to* be wrung from these published reports and was a time consuming and laborous process.

That in order to prove the facts as set up in the complaint it was necessary not only to have the records mentioned from the office of the Bank Commissioner of Utah, together with supporting affidavits, but also outside affidavits showing the excessive cost of operation, and procured affidavits showing admissions of M. E. Waddoups that he received a commission of 3% on all such items and affidavits showing payments to other parties for commissions.

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

That said Thomas W. Nealon made an examination of the statutes of Utah and these disclosed that corporations similar in nature to the defendant corporation were required to file verified annual statements with the Banking Department of Utah, and that it was the duty of the Bank Commissioner of Uath to make periodical examination of the affairs of the corporation.

XXXIV.

Assume that with this information before him, said Thomas W. Nealon conceived the idea that the defendant corporation could not file such reports for a period of eleven years without revealing the true condition of the corporation, and that a breakdown of such reports by competent accountants familiar with that line of business would necessarily reveal, when taken in connection with other evidence existing and available, that the corporation was and had been insolvent for years; that its expenses had exceeded its income for many years and that these statements would probably reveal the misconduct of the officers and directors of the corporation, as well as the mismanagement of its affairs and waste of its assets; that at the instance of said Thomas W. Nealon copies of these reports for eleven years were procured from the office of the Bank Commissioner of Utah [164] and affidavits were procured from persons who made these copies to the effect that they were correct; that the reports themselves had been sworn to by officers of the corporation at the time they were filed; that

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

upon procuring these, he and his co-solicitor consulted with Messrs. Willis H. Plunkett and James A. Smith, Certified Public Accountants, familiar with accounting in all its branches, including building and loan accounting, and submitted these reports to them, together with the contracts held by plaintiffs for the purpose of having such reports analyzed and broken down; that as a result of such consultation and such work upon the part of Messrs. Plunkett and Smith and the analysis and breaking down of such reports in connection with other evidence assembled by the solicitors for the plaintiffs, he procured sufficient evidence to establish a prima facie case to obtain the relief prayed for in the bill of complaint.

XXXV.

Assume that by reason of the fact that many novel questions of law were involved, it was necessary for Thomas W. Nealon to make an exhaustive study of the applicable principles of law and of the authorities which would sustain those principles upon a hearing in court and prove to the court the rights of the plaintiffs to the relief they sought; that it was necessary to make an exhaustive study of the statutes of Utah to ascertain whether there was anything in these statutes, which as a matter of public policy of that state would render contracts of the nature of plaintiffs and those similarly situated, void in so far as they attempted to create a lien, and this investigation enabled Thomas W. Nealon to establish to the

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

satisfaction of the various courts the validity of these liens; that much study was necessary also to an interpretation of the statute laws of California, Oregon, Idaho and Wyoming, in which states this corporation was doing business. [165]

XXXVI.

Assume that novel and difficult questions of law were involved in this litigation, questions that had not been definitely determined until the decision of the Supreme Court in this case, and to properly present these questions and overcome the contentions of the defendant corporation in opposition thereto, necessitated an immense amount of research work; that the applicable principles of law had not at the time the complaint was filed been determined by the Supreme Court of the United States nor by any of the federal courts of appeal and were therefore uncertain.

Assume further that the contention that the United States Court had a right to appoint a receiver of a building and loan association where the statutes at the domicile of the corporation provided for a liquidator by a state official, when the state official had shown himself unfit to administer the affairs of the delinquent corporation, and when the statutes under which he was appointed were inadequate to give this protection to litigants, a question raised for the first time in the annals of law so far as said Thomas W. Nealon is aware,

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

was upheld by the Circuit Court of Appeals, and for the first time that right was definitely settled and the principle established by the denial of the writ of certiorari by the Supreme Court.

Assume further that the contention of Thomas W. Nealon that the relation of debtor and creditor was created by the particular contracts and that a trust and lien was created as against the Building and Loan Association on behalf of the holders of the certificates, also raised for the first time, was established definitely, and in its decision the Circuit Court of Appeals definitely held that despite the label attached to the certificates, the instruments were not stock, but created [166] the relation of debtor and creditor, and that the language of the contract was sufficient to create an equitable lien in favor of such creditor, this also being established for the first time.

Assume further that although prior to this time it had been established that a building and loan association could borrow money and issue its promise to pay in the form of investment certificates, it had not been held that a building and loan association could pledge or mortgage its assets for the purpose of securing loans so obtained, until the final decision in this case.

Assume that another novel question involved was the force and effect of a statute of the state under which a corporation was organized when that state permitted a building and loan association to remove

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

its principal office to another state and carry on business in a foreign jurisdiction.

Assume that in the course of his research work,, Thomas W. Nealon examined and analyzed more than six hundred cases bearing upon the issues involved, as well as the statutes of the various states and many text books, this extensive research being necessary by reason of the numerous novel questions of law involved.

XXXVII.

Assume that the major portion of the time of said Thomas W. Nealon for a period of more than three and one half years was devoted to labor for and on behalf of the plaintiffs named and those similarly situated in the study of the principles of law governing the case, the analysis of the facts involved and assembling of evidence to support the allegations of the complaint, the preparation of pleadings in the case and obtaining the various orders and decrees in this suit, and in defending the decree of the lower court in the Circuit Court of Appeals and Supreme Court [167] of the United States, and the preparation as to the law and facts necessary to a successful conclusion of the case; that the necessary work for the preparation of the various briefs in the United States District Court, the Circuit Court of Appeals and the Supreme Court consumed more than 2930 hours, or 586 court days,— this exclusive of the time spent

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

in preparation of the necessary pleadings filed in the District Court and in miscellaneous research work, examinations made of the records of the Corporation Commission and State Banking Department, attendance on hearings in other courts wherein evidence against the said corporation was developed, attendance at hearings before the United States District Court and Circuit Court of Appeals at San Francisco, examination and study of pleadings and briefs of the opposition, conferences with attorneys for the corporation and the Bank Commissioner of Utah, conferences with Home Owners Loan Corporation officials, and conferences with attorneys for intervenors, and various creditors of the defendant corporation.

XXXVIII.

Assume that the office expenses of said Thomas W. Nealon for the 42 months during which he worked upon said case prior to the time when the receiver obtained actual possession of the assets of said Intermountain Building & Loan Association within the state of Arizona was $13,739.35.

XXXIX.

Assume that no compensation whatever has been received by said Thomas W. Nealon for his professional services rendered in said litigation, and that no agreement or understanding exists for any compensation to be paid to him, other than such as

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

may by allowed to him by the Court for his services in the premises, and that his compensation was entirely dependent upon the successful outcome of said litigation as described in this [168] hypothetical question.

LX.

Assume that 2,792 of the creditors of the Intermountain Building & Loan Association, an Utah corporation, situated similarly to those of the plaintiffs named in said litigation, elected to avail themselves of the benefits of the efforts of said Thomas W. Nealon and of the decree obtained.

LXI.

Assume that as a result of the professional services rendered in the ligitation described in this hypothetical question there was recovered for the benefit of the plaintiffs named and all others similarly situated, a trust fund consisting of cash, bonds, mortgages and real property of the value of $2,119,662.82.

Assume further that the trust fund established by the decree of the United States District Court for the District of Arizona consisted of assets within the state of Arizona of a value of $1,349,613.35, and of assets outside of the state of Arizona of a value of $770,049.47.

Assume further that the said decree removed the Intermountain Building & Loan Association as a delinquent trustee of said trust funds and

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

directed conveyances of all of the assets so recovered to be made the receiver appointed by the Court as trustee for the plaintiffs named in said suit in the United States District Court and all creditors similarly situated.

Assume further that all of the assets of the corporation in Arizona came into the actual physical possession of a receiver appointed by said United States District Court, who is now administering the receivership estate for the benefit of said plaintiffs named and all others similarly situated; that the portion of said trust fund situated in the states of Wyoming, Idaho and Utah are being administrated in ancillary proceedings in [169] said states in aid of the primary receivership in this state, and that suits are now being prosecuted in the states of California and Oregon to enforce in those states the decree of this Court referred to in this hypothetical question.

Now, Mr. Burges taking into consideration the professional standing and ability of Thomas W. Nealon, the importance of the litigation and the matters covered in this hypothetical question just presented, the fact that any fee to be received was based upon the contingency stated in the hypothetical question, the amount of labor performed by Thomas W. Nealon as set out in this hypothetical question, the amount involved in the litigation, the novel questions of law to be determined therein, the applicable principles of which had not thereto-

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

fore been settled by the courts, the hazard involved in proving the facts of the case, the nature of the case as a class suit, the fact that 2,792 of the creditors of the corporation similarly situated to the plaintiffs named have accepted the benefit of the decree obtained, and the results obtained, what, in your opinion, would be a reasonable compensation for the services of Thomas W. Nealon in said litigation? [170]

A. It is my opinion that a reasonable fee for the conduct of the litigation set forth in the question to which this is an answer would be ten per cent of the amount recovered for the use and benefit of your clients.

Q. Give the reasons for your opinion, Mr. Burges.

A. In forming the opinion I have just expressed I have taken into consideration what I always take into consideration in my own practice or when examined as to any one else's services, that is to say, the character and ability of the lawyer who has rendered the service, the amount involved in its general aspect. I give special attention and consideration to the net result to the clients. I take into consideration the character of the work, the complexity or simplicity of the questions involved, the novelty or commonplaceness of the questions involved, the effect that long continued, diligent application to one matter of that kind has on the general practice of the man doing the work. I think that has to be taken into consideration as it is my

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

experience that work of that kind indicated by your question has a very decided effect on the rest of your work during the period covered by it and, furthermore, always taking into consideration the hazard of uncompensated services where what you get is dependent entirely upon the success of your efforts in serving your clients. They are bound for nothing if you do not win, and, therefore, ought to pay proportionately when you do. I always take into consideration the general line of compensation that lawyers get and the difference in the compensation in different classes of litigation. In my experience the ordinary run of law suits on a promissory note provides for ten per cent if collected. Certainly nothing less than that occurs to me to be a reasonable fee no matter how large the amount is, [171] if it results in the sum contended for being collected either in whole or in substantial part. Therefore, while many are served in a class suit of this kind and large amounts are recovered it is only through a large amount of work competently rendered and the cost to the individual is even less than it would be on a simple sort of a promissory note, taking into consideration what he gets out of it. Generally speaking that is the way I arrive at fees for myself or anybody else and on that and believing that is the right way to do, I think ten per cent of the amount involved is a moderate or reasonable fee in the case.

WM. H. BURGES,
WILLIAM H. BURGES. [172]

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)
State of Texas,
County of El Paso

Be it known that I took the annexed and foregoing deposition pursuant to the annexed Notice; that I was then and there a duly appointed, qualified and acting Notary Public in and for the County of El Paso, State of Texas; that by virtue thereof I was authorized to administer an oath; that said William H. Burges, the witness before testifying was duly sworn to testify to the whole truth and nothing but the truth; and that the testimony of said witness was reduced to writing by me, and was carefully read over to him before he signed the same; that there was present at the taking of said deposition, in addition to the witness, Thomas W. Nealon, Petitioner; that said witness signed said deposition and wrote his name upon each piece of paper thereof upon which any portion of his testimony is written.

I, also, certify that I, Rose B. Greenawalt am one and the same person as Mrs. A. C. Greenawalt named in the Notice.

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

In witness whereof I have hereunto set my hand and the official of my office at El Paso, Texas, this 14th day of December, 1937.
[Notarial Seal] ROSE B. GREENAWALT,
Notary Public in and for El Paso County, Texas.
My commission expires May 31, 1939. [173]

[Endorsed]: Petr. Nealon's Exhibit No. 4 Admitted and Filed Dec. 20, 1937. Edward W. Scruggs, Clerk United States District Court for the District of Arizona. By Wm. H. Loveless, Chief Deputy Clerk. Case No. E-268 Phx., Gallegos vs. Intermountain. [178]

PETITIONER NEALON'S EXHIBIT No. 5

[Title of District Court and Cause.]

DEPOSITION OF SAMUEL L. PATTEE

Be It Remembered, That pursuant to the Notice hereto annexed, and at the office of Darnell, Pattee & Robertson, No. 410-413 Valley National Bank Building, Tucson, Arizona, before me, John W. Walker, a Notary Public in and for the County of Pima, State of Arizona, personally appeared Samuel L. Pattee, a witness produced on behalf of Thomas W. Nealon, Petitioner in the above entitled action now pending in said Court, who being by me first duly sworn was then and there examined and interrogated by said Thomas W. Nealon, Petitioner;

Petitioner Nealon's Exhibit No. 5—(Continued)
(Deposition of Samuel L. Pattee.)

that no person attened the taking of said deposition in behalf of any other person interested in said cause, and that the said deposition was in the words and figures following, to wit:

SAMUEL L. PATTEE,

Being first duly sworn according to law, deposes and says:

Examination

By Mr. Nealon:

Q. State your name please.

A. Samuel L. Pattee. [183]

Q. And your profession?

A. Lawyer.

Q. How long have you been practicing law?

A. I was admitted to the bar first in 1891, and have been practicing in Arizona since April, 1899.

Q. And your place of residence?

A. Tucson, Arizona.

Q. And you are a former Judge of the Superior Court of Arizona, for the County of Pima?

A. Yes sir, six years; from 1915 to 1922.

Q. And you have, by request, sit in cases in the Supreme Court many times, have you not?

A. I have several times.

Q. You are a member of the bar of the Federal Court?

A. Yes sir.

Q. Of the United States, for the District of Arizona?

A. Yes sir.

Petitioner Nealon's Exhibit No. 5—(Continued)
(Deposition of Samuel L. Pattee.)

Q. And you have practiced before the various Federal Courts of the state?

A. Yes sir.

Q. In both law and equity cases?

A. Yes sir in both since Arizona became a state, and before that in the Federal Courts when the District Courts had federal jurisdiction.

Q. During the territorial days in Arizona?

A. Yes sir.

Q. Are you familiar with the rates of attorneys' fees prevailing throughout Arizona?

A. I think so. I have practiced in both ends of the state; eight years in Prescott and the rest of the time here.

Q. Do you know the petitioner, Thomas W. Nealon?

A. I do. [184]

Q. How long have you known him?

A. I think I have been acquainted with him about twenty years.

Q. Twenty years any way?

A. Twenty years, yes.

Q. Please state your knowledge of the standing of the petitioner as a member of the bar here?

A. I regard him as a lawyer of excellent ability—of a high order of ability, and as far as his personal standing is concerned, on a par with anybody in the state.

Q. You have read the opinion of the Circuit Court of Appeals in the case of Gallegos and oth-

Petitioner Nealon's Exhibit No. 5—(Continued)
(Deposition of Samuel L. Pattee.)

ers, versus Intermountain Building and Loan Association?

A. Yes sir, I have.

[Clerk's note: hypothetical questions propounded to witness Samuel L. Pattee are omitted from this transcript pursuant to stipulation filed April 9, 1943.] [185]

A. Not less than one hundred thousand dollars.

Q. Now, give your reasons for your opinion, Judge?

A. I have read the hypothetical question presented to me; I have read the opinion of the Circuit Court of Appeals of the Ninth Circuit, and I think I can surmise from the statement perhaps the questions that were presented to Mr. Nealon and encountered by him in the course of the litigation even beyond the scope of the hypothetical question and the opinion of the Court. I have been surprised at the variety and extent of involvement of the questions presented, and I can appreciate the immense amount of work that must have been done by Mr. Nealon to present the various matters to the United States District Court that resulted in the various orders and decrees he obtained, and the immense amount of work that must have been done in order to properly present the various questions to the Circuit Court of Appeals, and I take into consideration the highly satisfactory result received, the large amount involved, and the large amount which was retained, I might say, in the

Petitioner Nealon's Exhibit No. 5—(Continued)
(Deposition of Samuel L. Pattee.)

jurisdiction for the benefit of creditors, otherwise no one can tell what would have become of them, judging from the past conduct of those having charge, and one can easily surmise there would not have been anything left. Considering Mr. Nealon's standing at the bar, and the fact that he is one of the most thorough and careful lawyers that I know of and the fact that when he goes into a subject, he exhausts it, as I know from experience in opposing him in litigation, all of those matters and the general run of the question, and the services performed, and the work that must have been done which the hypothetical question probably does not set forth, so I would say that Mr. Nealon was entitled, at a fair basis, to ten per cent of the amount recovered, that would have been much more than I have given him as the value of the services, but I put it at a [186] figure which I think I would do if I was sitting in a court and passing upon the same.

SAMUEL L. PATTEE.

State of Arizona,
County of Pima—ss.

I, John W. Walker, do hereby certify that I am a duly appointed, qualified and acting Notary Public of the State of Arizona, in and for the County of Pima; that I am a duly qualified and practicing shorthand reporter.

That as such Notary Public I was present at the taking of the deposition of Samuel L. Pattee, at

Petitioner Nealon's Exhibit No. 5—(Continued)
(Deposition of Samuel L. Pattee.)

the office of Darnell, Pattee and Robertson, Nos. 410-413 Valley National Bank Building, in the City of Tucson, Pima County, Arizona, on Thursday, the 16th day of December, 1937, said deposition being taken on behalf of the petitioner, Thomas W. Nealon, in the cause of Guadalupe R. Gallegos, et al, v Intermountain Building and Loan Association, a corporation, being cause No. E-268, Phoenix, in the District Court of the United States, for the District of Arizona.

That said witness was by me first duly sworn to testify to the truth, the whole truth and nothing but the truth in the giving of said deposition. That I took down in shorthand the questions propounded to the witness, and his answers thereto, and that I afterwards reduced the same to typewriting, and the same were carefully read over to said witness before he signed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal at Tucson this 16th day of December, 1937.

[Notarial Seal] JOHN W. WALKER,
Notary Public, Pima County,
Arizona. [187]

[Endorsed]: Petr. Nealon's Exhibit No. 5. Admitted and Filed Dec. 20, 1937. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Wm. H. Loveless, Chief Deputy Clerk. Case No. E-268 Phx. Gallegos vs. Intermountain. [188]

REPORTS AND ACCOUNTS OF HARRY W. HILL, RECEIVER

In the United States District Court for the District of Arizona

(SCHEDULE "A"—TRIAL BALANCE AS OF DECEMBER 31, 1939; SCHEDULE "B"—REAL ESTATE LOANS DECEMBER 31, 1939; SCHEDULE "C" — REAL ESTATE CONTRACTS DECEMBER 31, 1939; SCHEDULE "D"—REAL ESTATE OWNED DECEMBER 31, 1939; SCHEDULE "E"—REAL ESTATE SOLD DECEMBER 31, 1939; ATTACHED TO "REPORT AND ACCOUNT OF HARRY W. HILL, AS RECEIVER OF INTERMOUNTAIN BUILDING & LOAN ASSOCIATION, AN UTAH CORPORATION, AND PETITION FOR APPROVAL THEREOF, AND FOR ORDER FIXING DATE OF HEARING AND PRESCRIBING THE FORM OF NOTICE TO BE GIVEN." (FILED MARCH 20, 1940).

"SCHEDULE "A"—TRIAL BALANCE AS OF DECEMBER 31, 1939

DEBITS

Cash on hand & in banks—Arizona	$ 286,408.35
Other States	59,391.08
Real Estate loans—Arizona	5,984.88
Other States	505,102.75
Real Estate Contracts—Arizona	53,099.62
Other States	61,647.18
Real Estate Owned—Arizona	363,312.68
Other States	589,745.35
Promissory notes & second mortgages—Arizona	3,346.72
Certificate loans—Arizona	130,388.06
Other States	194,312.77
Stocks, bonds & securities—Other States	161,575.00

Schedule "A"—Trial Balance as of December 31, 1939—(Continued)
Debits—(Continued)

Home Building & Loan Co. stock			51,000.00
Deficiency Judgments			50,496.71
Claims and judgments			173.64
Accounts receivable—Arizona			1,831.80
Other States			18,552.12
Furniture and Fixtures—Arizona			11,421.86
Other States			4,061.95
Tax Suspense—Oregon			2,769.97
Real estate operating expense—Arizona			116,529.42
	11-30-35 to 3-31-37	4-1-37 to 12-31-39	
Sewer & Water	$ 1,467.38	$ 2,252.86	
Repairs	4,937.87	6,793.80	
Taxes & Assessments	19,095.67	44,720.16	
Ins. & Title Expense	3,534.11	7,078.29	
Rental & Misc Expense	2,218.20	3,867.65	
Golf Course Expense	14,175.12	2,741.16	
REO 4 and REO 32	319.67	647.42	
Liability Ins. & Agents Bonds	1,906.74	773.50	
	$ 47,654.76	$ 68,874.66	
Real Estate Sales—Close Outs—Arizona			3,714.22
Other States			73.53

Schedule "A"—Trial Balance as of December 31, 1939—(Continued)
Debits—(Continued)

Real Estate Operating Expense—Idaho	1,994.80
Receiver's Liquidating Expense—Arizona	160,623.05

[189]

	11-30-35 to 3-31-37	4-1-37 to 12-31-39
Receiver's Salary	$ 10,120.02	$ 15,300.00
Legal Advisors	30,546.00	20,625.00
Plunket Audit Company	4,821.34	
Employees Salaries	21,740.19	27,965.63
Printing, Supplies & Stationery	1,446.59	728.71
Rent	3,325.00	4,765.40
Telephone, Telegraph, postage	1,698.18	1,169.16
Travel Expense	3,999.91	2,969.49
Office equip. & Maintenance	105.97	34.67
Courts Costs & Fees	893.19	710.14
Bonds	680.48	523.43
Insurance	838.03	739.42
Miscellaneous Items	414.93	677.75
Appraisal Fees	937.80	1,235.56
Social Security & Unemployment tax	266.76	1,344.30
	$ 81,834.39	$ 78,788.66

Schedule "A"—Trial Balance as of December 31, 1939—(Continued)

Debits—(Continued)

Expense—California	$ 3,115.40
Expense—Idaho	6,503.60
Expense—Utah	138.97
Expense—Oregon	1,837.71
Loss on Realization—Arizona	120,004.17
Loss on Realization—Other States	52,802.10
Real Estate Abandoned—Idaho	14,888.40
Receiver's Set Offs in Liquidation	17,429.81
	$3,054,277.67

CREDITS

Deficiency Judgments	50,747.70
Receiver's Income	162,762.46

	11-30-35 to 3-31-37	4-1-37 to 12-31-39
Rents	$ 34,517.81	$ 60,732.54
Golf Course	12,333.93	1,596.05
REO 4—Nebraska	327.49	698.40
Real Estate Loans—Interest	12,679.97	17,872.33
Real Estate Contracts—Interest	788.20	7,566.29
Warrants—Interest	169.37	61.72

Schedule "A"—Trial Balance as of December 31, 1939—(Continued)
Credits—(Continued)

	11-20-35 to 3-31-37	4-1-37 to 12-31-39	
HOLC & Postal Savings Bonds—Interest	$ 1,092.23	$ 10,689.53	
Notes & Second Mortgages, Interest	165.32	417.68	
Accts. Receivable & Judgments Int		1,053.60	
	$ 62,074.32	$100,688.14	
Interest—Other States			$ 2,853.57
Real Estate Operating—Other States			2,352.63
Receiver's Income—Gain on Realization			7,053.68
General Suspense			862.75
Trust Accounts—Payments After Receivership			1,708.41
Accrued Int. Uncollected (12-31-33) Other States			39,772.71
			[190]
Reserve for Maturities			150,029.91
Permanent Reserve Fund Stock			87,671.42
General Suspense			75,813.12
Stock Suspense—Certificates			31,565.22
Investment Certificates			2,045,036.44
Coupon Stock			79,342.01
Fully Paid Certificates			268,894.35
Extra Payments on Certificates			13,311.65
Pass Books Saving Certificates			34,499.64
		Total	$3,054,277.67

SCHEDULE "B"—REAL ESTATE LOANS

December 31, 1939

No.	Memo	Balance 3-31-37	Balance 12-31-39
7	Active	$ 13,116.25	$ 5,984.88
19	Foreclosed—Deeds Secured	103,866.47	
2	Warranty Deed Taken	3,298.29	
24	Paid in Full	12,406.16	
1	Compromise Settlement	360.57	
53		$133,047.74	$ 5,984.88

SCHEDULE "C"—REAL ESTATE CONTRACTS

December 31, 1939

No.	Memo	Balance 3-31-37	Balance 12-31-39
1	Active	$ 450.00	$ 113.34
11	Paid in Full	9,686.44	
3	Compromised	7,593.17	
52	Sold Under Contract Since 4-1-37 (Original Amount $93,710.00)		52,986.28
		$ 17,729.61	$ 53,099.62

SCHEDULE "D"—REAL ESTATE OWNED

December 31, 1939

No.	Memo	Balance 3-31-37	Balance 12-31-39
27	Now Owned	$190,827.00	$191,523.47
12	Cash Sales	36,357.79	
23	Sold Under Contract	73,442.95	
	(Title Acquired) (Net After Sales)		171,789.21
		$300,627.74	$363,312.68

SCHEDULE "E"—REAL ESTATE SOLD

December 31, 1939

		Sale Price	Appraised Value	Book Value	Book Loss
24	Cash Sales	$ 42,053.50	$ 43,554.01	$ 75,000.08	$ 32,946.58
52	Contract Sales	93,710.00	96,099.52	122,672.51	28,962.51
		$135,763.50	$139,653.53	$197,672.59	$ 61,909.09

[Endorsed]: (Report and Account of Harry W. Hill, as Receiver of Intermountain Building & Loan Association, an Utah Corporation, and Petition for Approval thereof and for Order Fixing Date of Hearing and Prescribing the Form of Notice to be Given) Filed Mar 20 1940. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Helen Stroup, Deputy Clerk. **[191]**

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PETITION OF ELIZABETH G. MONAGHAN FOR ALLOWANCE OF ATTORNEY'S FEES, EXPENSES, ET CETERA.

This matter came on regularly for hearing before the court on the 20th day of December, 1937, pursuant to an order to show cause which was made and entered by this court under date of November 22, 1937, Honorable Dave W. Ling, United States District Judge presiding and sitting without a jury. Petitioner, Elizabeth G. Monaghan appeared in person and by her attorney, Joseph H. Morgan, Esquire. Evidence was introduced, both oral and documentary, on behalf of said petitioner, and the matter was duly submitted to the court for decision, and taken under advisement.

Now, Therefore, having duly considered all the evidence and pleadings, and being fully advised in the premises, the court does hereby, pursuant to rule 52 of the Federal Rules of Civil Procedure, make and adopt the following as its special findings of fact, and conclusions of law, in this matter. [192]

SPECIAL FINDINGS OF FACT

I.

That the petitioner, Elizabeth G. Monaghan, was during all of the times herein mentioned, an attorney at law duly licensed to practice in all courts in the State of Arizona, and particularly in the

District Court of the United States for the District of Arizona.

II.

That early in the year 1932 she was employed by a number of creditors of Intermountain Building & Loan Association, an Utah corporation, which was duly authorized and licensed to engage in, and which was engaging in and transacting business in the state of Arizona, to investigate into the affairs of said association as to its solvency and administration.

III.

That the petitioner made an extensive investigation in the state of Arizona and in the state of Utah and discovered that the business of the defendant association was being conducted in a manner contrary to law, extravagantly and wastefully, and in a manner which would ultimately result in the waste and dissipation of all of the assets of the association, and with the assistance of one James A. Smith, a certified public accountant practicing his profession in Phoenix, Arizona, determined that the association had been insolvent from about the year 1922, if not before that date.

IV.

That said petitioner, Elizabeth G. Monaghan, was authorized in writing by Guadalupe R. Gallegos and Francisca Gallegos, his wife, Inga G. Gudmundson, and Mata E. Dexter, in their own behalf, and in behalf of other similarly situated, to institute a suit in the District Court of the United States

[193] for the District of Arizona, to have said association adjudged to be insolvent and to have a receiver appointed to liquidate the assets of said association, and to do all things necessary or essential to that end, including the power and authority to associate counsel in the conduct of said proceedings, and to file, defend and conduct suits in the state courts in aid thereof.

V.

That pursuant to said authorization the petitioner, Elizabeth G. Monaghan, on April 8, 1933, filed a bill of complaint in equity, being cause No. E-268-Phoenix, entitled as in the caption hereof, in the United States District Court for the District of Arizona; that subsequently and on or about the 23rd day of June, 1933, she filed an amended bill of complaint in the cause herein mentioned.

VI.

That subsequent to the filing of the amended bill of complaint petitioner formally associated one Thomas W. Nealon as counsel in the suit mentioned.

VII.

That the suit mentioned was opposed by the defendant Intermountain Building & Loan Association, and by one J. A. Malia, Bank Commissioner of the state of Utah, who had theretofore been permitted to intervene in the cause.

VIII.

That after a number of hearings had over the period of about a year, in which petitioner and her co-counsel, Thomas W. Nealon, were opposed by several attorneys practicing in the state of Arizona, and by two attorneys of the state of Utah, one of which was an assistant attorney general for that state, the United States District Court for the District of Arizona, on April 20, [194] 1934, the Honorable F. C. Jacobs presiding, appointed a receiver pendente Lite for said association.

IX.

That an appeal was taken by the defendant association and by J. A. Malia, Bank Commissioner of the state of Utah, intervenor, from the order appointing a receiver pendente lite to the United States Circuit Court of Appeals for the Ninth Circuit; that said appeal was docketed as No. 7516 in the last mentioned court.

X.

That the United States Circuit Court of Appeals for the Ninth Circuit, on August 5, 1935, entered its judgment sustaining the order of the United States District Court for the District of Arizona appointing a receiver pendente lite; that the decision of the United States Circuit Court of Appeals for the Ninth Circuit is reported in 78 Fed. (2d) at page 972.

XI.

That the defendant, Intermountain Building & Loan Association, an Utah corporation, and J. A.

Malia, Bank Commissioner of the state of Utah, filed a petition for a writ of certiorari in the Supreme Court of the United States; that the petitioner and her co-counsel, Thomas W. Nealon, resisted said petition and the same was denied by the Supreme Court of the United States on November 11, 1935 (296 U. S. 639), and the mandate of the United States Circuit Court of Appeals for the Ninth Circuit, in its cause No. 7516, was returned to the United States District Court for the District of Arizona, and was by that court, on December 2, 1935, spread on the records in its cause E-268-Phoenix, entitled as in the caption hereof.

XII

That after due notice and trial on the merits the [195] United States District Court for the District of Arizona, on January 6, 1937, found that the Intermountain Building & Loan Association, an Utah corporation, was insolvent and that the allegations of the amended complaint were true, and entered its findings of fact and conclusions of law thereon; that after the defendant association was adjudged to be insolvent the United States District Court for the District of Arizona appointed a permanent receiver to liquidate the assets of the defendant association.

XIII.

That the fund, represented by the assets of Intermountain Building & Loan Association, an Utah corporation, located in the state of Arizona, which was brought into court by petitioner as attorney

for plaintiffs and others similarly situated, had a total book value as of April 1, 1937, of approximately $1,597,841.89, without taking into consideration probable loss on realization; that the assets of the defendant association in other states, to-wit, California, Oregon and Wyoming, which were not in the actual or constructive possession of the receiver appointed by the District Court of the United States for the District of Arizona, had a book value of approximately $1,135,229.34, without taking into consideration probable loss on realization; that the receiver appointed by this court had no control whatsoever of assets located in California, Oregon and Wyoming; that the courts of the state of Utah have appointed one James L. White as liquidator in that state and the assets in that state had a book value of approximately $414,808.16, without taking into consideration probable loss on realization; that the net assets are eventually going to be turned over to this court's receiver for distribution. [196]

XIV.

That the approximate assets now in the hands of the receiver appointed by this court have a book value of approximately $633,131.59, with a probable further loss on realization of approximately $156,000.00; that the total realization in the states of Arizona, California, Oregon, Utah and Wyoming will be approximately $1,237,900.10, after loss on realization.

XV.

That approximately 2792 creditors of the defendant association filed their claims with the receiver and thereby elected to accept the services of petitioner Elizabeth G. Monaghan, and obligated themselves to pay her a reasonable fee for the services rendered to them by her in said suit to the same extent as if they had signed a written contract to that effect before the suit was brought.

XVI.

That the only creditors who failed to file claims to participate in the said fund were creditors in the state of California for claims aggregating approximately $70,000.00, and creditors in the state of Oregon having claims aggregating approximately $260,000.00, for the reason that the assets of the association in the states of California and Oregon were being administered by statutory liquidators under the laws of said states pursuant to proceedings filed in said respective states subsequent to the filing of the suit in equity in the United States District Court for the District of Arizona, above entitled and numbered.

XVII.

That Honorable Dave W. Ling was appointed and qualified as a Judge of the United States District Court for the District of Arizona on June 10, 1936. [197]

XVIII.

That the expenses of $301.65 incurred by petitioner, as set forth in her petition, were included in

the expenses listed by Thomas W. Nealon, her co-counsel, and allowed him by this court.

XIX.

That the allowance of $10,000.00 for expenses petitioner claims she and her co-counsel, Thomas W. Nealon, became obligated to pay to James A. Smith, a certified public accountant, is not a proper charge against the funds in the hands of the receiver.

XX.

That petitioner between the 1st day of December, 1935, and the 1st day of April, 1937, receive a salary of $250.00 per month for services rendered as one of the attorneys for the former receiver of Intermountain Building & Loan Association, or a total sum covering salary for the period of time mentioned of $4,000.00.

XXI.

That subsequent to the time of the hearing of petitioner's petition, to-wit, subsequent to December 20, 1937, the petitioner, Elizabeth G. Monaghan, was paid allowances on order of this court as follows: February 21, 1937—$5,000.00; March 6, 1939—$2,500.00, or a total of $7,500.00 for her services rendered in connection with the preparation, institution and trial of cause No. E-268-Phoenix, entitled as shown in the caption hereof, including services rendered by her on the appeal from the interlocutory decree to the Circuit Court of Appeals for the Ninth Circuit, and for her services in opposing the petition of the defendant association and J. A. Malia for writ of certiorai to review the decision of the Circuit

Court of Appeals for the Ninth Circuit in cause No. 7516. [198]

XXII.

That a reasonable compensation to the attorneys and/or solicitors, i.e. Elizabeth G. Monaghan and Thomas W. Nealon, for their services as specified in their respective petitions on file herein is $25,000.00; that a reasonable compensation to petitioner Elizabeth G. Monaghan for all her services rendered in connection with the matters and things set forth in her petition is $12,500.00, or one-half of the total allowances, less the amount heretofore paid to her on account, to-wit, $7,500.00.

CONCLUSIONS OF LAW

(1) That petitioner, Elizabeth G. Monaghan, is entitled to total allowance of $12,500.00 or one-half of the amount allowed by legal services rendered by her and her co-counsel, Thomas W. Nealon, less the amount of $7,500.00 already paid to her on account.

(2) That petitioner, Elizabeth G. Monaghan, is not entitled to expenses totalling $301.65, claimed by her.

(3) That petitioner, Elizabeth G. Monaghan, is not entitled to an allowance for services claimed to be performed by James A. Smith, a certified public accountant, which she claims she and her co-counsel, Thomas W. Nealon, are obligated to pay.

(4) That the petitioner, Elizabeth G. Monaghan, is entitled to have a lien upon the assets of Intermountain Building & Loan Association, an Utah corporation, now in the hands of Harry W. Hill, Re-

ceiver, for the sum of $5,000.00 until such sum is paid; and that each of the creditors of said association who have elected to accept the benefit of petitioner's efforts bear their proportionate share of such allowance.

That the foregoing Special Findings of Fact and [199] Conclusions of Law be entered nunc pro tunc as of the 7th day of December, 1942.

Dated at Phoenix, Arizona, this 5th day of March, 1943.

DAVE W. LING
Judge of the District Court of the United States for the District of Arizona. [200]

[Title of District Court and Cause.]

STIPULATION RE FINDINGS OF FACT AND CONCLUSIONS OF LAW

It is stipulated by and between the petitioner, Elizabeth G. Monaghan, through her attorney, Henry S. McCluskey, Esquire, and Harry W. Hill, as Receiver of Intermountain Building & Loan Association, an Utah corporation, through his attorney Louis B. Whitney, Esquire, that the foregoing Findings of Fact and Conclusions of Law may be signed by the Judge of the United States District Court for the District of Arizona, and entered and filed nunc pro tunc as of December 7, 1942.

Dated at Phoenix, Arizona, this 5th day of March, 1943.

HENRY S. McCLUSKEY
Attorney for Petitioner.
LOUIS B. WHITNEY
Attorney for Harry W. Hill, Receiver of Intermountain Building & Loan Association, an Utah corporation.

[Endorsed]: Findings of Fact etc. and Stipulation Filed Mar. 5, 1943. Edward W. Scruggs, Clerk United States District Court for the District of Arizona. By Gwen. Roby, Deputy Clerk. [201]

In the District Court of the United States
for the District of Arizona

No. E-268-Phoenix

GUADALUPE R. GALLEGOS, et al.,
Plaintiffs,
vs.
INTERMOUNTAIN BUILDING & LOAN ASSOCIATION, a corporation,
Defendant.

FINAL ORDER FIXING ATTORNEYS' FEES AND EXPENSES, AND ORDERING PAYMENT OF BALANCE DUE ELIZABETH G. MONAGHAN.

Whereas, Elizabeth G. Monaghan, formerly one of the attorneys for Henry S. McCluskey the former

receiver of Intermountain Building & Loan Association, an Utah corporation, having heretofore, and on the 22nd day of November, 1937, filed in this court and cause her verified petition praying that that court allow her such sum as it deems reasonable compensation to her for her services rendered in connection with the preparation, institution and trial of the above entitled and numbered cause, including services rendered by her on the appeal of the interlocutory decree rendered herein to the Ninth Circuit Court of Appeals, and for her services in opposing the petition of the defendant corporation and J. A. Malia to the Supreme Court of the United States for a writ of certiorari to review the proceedings in this court and the circuit court of appeals, and praying that such allowance be for all legal services rendered by the solicitors for the plaintiffs in the above entitled and numbered action; and further praying that she be allowed the additional sum of $401.65 for expenses [202] claimed to have been necessarily incurred by her, as set forth in the petition above referred to; and further praying that she be allowed the additional sum of $10,000.00 for claimed expenses she became obligated to pay to one James A. Smith, C.P.A.; and

Whereas, it appears that said petition of Elizabeth G. Monaghan before referred to duly and regularly came on for hearing before this court on the 20th day of December, 1937, pursuant to an order to show cause which was made and entered by this court in the above entitled and numbered proceeding under date of November 22, 1937, and after witnesses had

been examined and sworn and evidence introduced in support of said petition, the said petition was submitted and taken under advisement; and

Whereas, it appears that said petitioner subsequent to the hearing had on said petition, to-wit, subsequent to December 20, 1937, was by orders of this court theretofore duly made and entered, paid allowances on account as follows: February 21, 1938 —$5,000.00; March 6, 1939—$2,500.00, or a total of $7,500.00; and

Whereas, it appears that heretofore, to-wit: and between the 1st day of December, 1935, and the 1st day of April, 1937, said petitioner Elizabeth G. Monaghan received a salary of $250.00 per month for services rendered as one of the attorneys for the former receiver of Intermountain Building & Loan Association, or a total sum covering said salary for said period of time of $4,000.00; and

Whereas, it appears to this court that a reasonable compensation to the attorneys and/or solicitors for their services rendered as specified in the petitions on file herein is $25,000.00; and [203]

Whereas, it appears to this court that a reasonable compensation to said petitioner for all of her services rendered in connection with the matters and things set forth in her petition would be $12,500.00, or one-half of said total allowance, less the amounts heretofore paid petitioner on account, to-wit: $7,500.00; and

Whereas, it appears to this court that the sum of $4,000.00 covering her salary between December 1,

1935, and April 1, 1937, is sufficient compensation for petitioner as one of the attorneys for the former receiver, Henry S. McCluskey;

Now, Therefore, the premises considered, It Is Ordered, Adjudged and Decreed, that the total compensation of Elizabeth G. Monaghan on account of services rendered by her as an attorney in the preparation, institution and trial of the foregoing entitled and numbered cause, as set forth in her petition, is hereby fixed at $12,500.00, same being one-half of the total compensation fixed and allowed for all services rendered by petitioner and her co-attorney;

It Is Further Ordered, Adjudged and Decreed that Harry W. Hill, Receiver of Intermountain Building & Loan Association, an Utah corporation, be and he is hereby authorized, empowered and directed to pay to the said Elizabeth G. Monaghan the sum of $5,000.00 as and for the balance of said $12,500 fixed by this court as final compensation for all services heretofore rendered and performed by the said Elizabeth G. Monaghan as set forth in her said petition.

It Is Further Ordered, Adjudged and Decreed that the expenses and allowances, other than compensation for petitioner, prayed for in her petition be and they hereby are denied in toto.

It Is Further Ordered, Adjudged and Decreed and the Court does hereby Order, Adjudge and Decree that this is a final allowance and covers all services heretofore rendered by said [204] Elizabeth

G. Monaghan, as set forth in her said petition and as attorney for the former receiver.

It Is Further Ordered, Adjudged and Decreed, and the court does hereby Order, Adjudge an Decree that the petitioner, Elizabeth G. Monaghan, have a lien upon the assets of Intermountain Building & Loan Association, an Utah corporation, now in the hands of Harry W. Hill, as receiver of such association, for the said sum of $5,000.00 until such sum is paid; and that each of the creditors of said association who have elected to accept the benefit of said petitioner's efforts bear their proportionate share of such allowance.

Done in Open Court this 7 day of December, 1942.

DAVE W. LING
Judge of the United States
District Court for the District
of Arizona.

[Endorsed]: Filed Dec. 7, 1943. [205]

[Title of District Court and Cause.]

FINAL ORDER FIXING ATTORNEYS' FEES AND EXPENSES, AND ORDERING PAYMENT OF BALANCE DUE THOMAS W. NEALON

Whereas, Thomas W. Nealon, formerly one of the attorneys for Henry S. McCluskey the former receiver of Intermountain Building & Loan Association, an Utah corporation, having heretofore, and

on the 15th day of October, 1937 filed in this court and cause his verified petition praying that this court allow him such sum as it deems reasonable compensation to him for his services rendered in connection with the preparation, institution and trial of the above entitled and numbered cause, including services rendered by him on the appeal of the interlocutory decree rendered herein to the Ninth Circuit Court of Appeals, and for his services in opposing the petition of the defendant corporation and J. A. Malia to the Supreme Court of the United States for a writ of certiorari to review the proceedings in this court and the circuit court of appeals, and praying that such allowance be on the basis of one-half of such sum as this court may find to be a reasonable sum for all legal services rendered by the solicitors for the plaintiffs in the above entitled and numbered action; and further praying that he be allowed the additional sum of $1330.40 for [206] out-of-pocket expenses necessarily incurred by him, as set forth in the petition of said Thomas W. Nealon heretofore filed in this court and above referred to; and further praying that in the event this court should deem it inadvisable at that time to pay to said Thomas W. Nealon the full amount which he would be entitled to for his services as solicitor for the plaintiffs in the above entitled proceeding that this court make an allowance to him for the amount of out-of-pocket expenses incurred by him and and an allowance upon account for the services rendered by him; and

Whereas, it appears that said petition of Thomas W. Nealon before referred to duly and regularly came on for hearing before this court on the 20th day of December, 1937, pursuant to an order to show cause which was made and entered by this court in the above entitled and numbered proceeding under date of October 15, 1937, and after witnesses had been examined and sworn and evidence introduced in support of said petition, the said petition was submitted and taken under advisement; and

Whereas, it appears that said petitioner subsequent to the hearing had on said petition, to-wit, subsequent to December 20, 1937, was by orders of this court theretofore duly made and entered, paid allowances on account as follows: February 21, 1938—$5,000.00; March 6, 1939—$2,500.00, or a total of $7,500.00; and

Whereas, it appears that heretofore, to-wit: and between the 1st day of December, 1935, and the 1st day of April, 1937, said petitioner Thomas W. Nealon received a salary of $300.00 per month and an additional amount of $159.00 per month as expenses for services rendered as one of the attorneys for the former receiver of Intermountain Building & Loan Association, or a total sum covering salary and expenses for said period of time of $7,344.00; and [207]

Whereas, it appears to this court that a reasonable compensation to the attorneys and/or solicitors for their services rendered as specified in the petitions on file herein is $25,000.00; and

Whereas, it appears to this court that a reasonable compensation to said petitioner for all of his services rendered in connection with the matters and things set forth in his petition would be $12,500.00, or one-half of said total allowance, less the amounts heretofore paid petitioner on account, to-wit: $7,500.00; and

Whereas, it appears to this court that the sum of $7,344.00 covering salary and expenses between December 1, 1935, and April 1, 1937, is sufficient compensation for petitioner as one of the attorneys for the former receiver, Henry S. McCluskey;

Now, Therefore, the premises considered, It Is Ordered, Adjudged and Decreed, that the total compensation of Thomas W. Nealon on account of services rendered by him as an attorney in the preparation, institution and trial of the foregoing entitled and numbered cause, as set forth in his petition, is hereby fixed at $12,500.00, same being one-half of the total compensation fixed and allowed for all services rendered by petitioner and his co-attorney;

It Is Further Ordered, Adjudged and Decreed that Harry W. Hill, Receiver of Intermountain Building & Loan Association, a Utah corporation, be and he is hereby authorized, empowered and directed to pay to the said Thomas W. Nealon the sum of $5,000.00 as and for the balance of said $12,500.00 fixed by this court as final compensation for all services heretofore rendered and performed

by the said Thomas W. Nealon as set forth in his said petition.

It Is Further Ordered, Adjudged and Decreed that said Harry W. Hill, receiver of Intermountain Building & Loan [208] Association, an Utah corporation, be and he is hereby authorized, empowered and directed to pay to the said Thomas W. Nealon the additional sum of $1330.40, being expenses incurred by said petitioner, as set forth in his said petition.

It Is Further Ordered, Adjudged and Decreed and the Court does hereby Order, Adjudge and Decree that this is a final allowance and covers all services heretofore rendered by said Thomas W. Nealon, as set forth in his said petition and as attorney for the former receiver.

It Is Further Ordered, Adjudged and Decreed, and the court does hereby Order, Adjudge and Decree that the petitioner, Thomas W. Nealon, have a lien upon the assets of Intermountain Building & Loan Association, an Utah corporation, now in the hands of Harry W. Hill, as receiver of such association, for the said sums of $5,000.00 and $1,330.40 respectively, until such sums are paid; and that each of the creditors of said association who have elected to accept the benefit of said petitioner's efforts bear their proportionate share of such allowance.

Done In Open Court this 7 day of December, 1942.

DAVE W. LING,
Judge of the District Court of the United States for the District of Arizona.

[Endorsed]: Filed Dec. 7, 1942. [209]

[Title of District Court and Cause.]

REPORT AND ACCOUNT OF HARRY W. HILL, AS RECEIVER OF INTERMOUNTAIN BUILDING & LOAN ASSOCIATION, AN UTAH CORPORATION, AND PETITION FOR APPROVAL THEREOF AND FOR ORDER FIXING DATE OF HEARING AND PRESCRIBING THE FORM OF NOTICE TO BE GIVEN

Comes Now Harry W. Hill, as Receiver of Intermountain Building & Loan Association, an Utah corporation, and makes and files this report of the administration and receivership of Intermountain Building & Loan Association, an Utah corporation, for the period commencing January 1, 1940, to and including December 31, 1942, and in this behalf represents and shows:

I.

That Harry W. Hill, Receiver of said association, heretofore and on the 20th day of March, 1940, filed

in this court and cause a report of his administration of the affairs of said association, which report embraced the period of receivership and his administration from April 1, 1937, to and including December 31, 1939. This report covers the period from January 1, 1940, to and including December 31, 1942. [210]

II.

That the following, designated as "Schedule A—Trial Balance" shows the balances of the various accounts as of the close of business December 31, 1942, which trial balance, with the exceptions of Idaho and Arizona, is not current. The Idaho receivership assets have been distributed to this Receiver and are included in the following "Schedule A—Trial Balance"

SCHEDULE "A"—TRIAL BALANCE AS OF DECEMBER 31, 1942

DEBITS

Cash on Hand and in Banks—	
Arizona	$ 357,789.06
Other States	59,391.08
Real Estate Loans—Arizona	50.23
Other States	505,102.75
Real Estate Contracts—Arizona	23,814.90
Other States	61,619.90
Real Estate Owned—Arizona	228,086.72
Other States	578,920.48
Promissory Notes & Second Mortgages—Arizona	2,501.43
Certificate Loans—Arizona	130,388.06
Other States	194,306.32
Stocks, Bonds & Securities—Other States	161,575.00
Home Building & Loan Company Stock	51,000.00

Debits—(Continued)

Deficiency Judgments		48,792.39
Claims and Judgments		*272.74*

Figures in italics typed in red.

Accounts Receivable—Arizona		9,510.39
Other States		10,860.92
Furniture and Fixtures—Arizona		11,378.86
Other States		4,061.95
Tax Suspense—Oregon		2,769.97
Real Estate Operating Expenses—Arizona		151,275.20
Real Estate Operating Expense from 1-1-40 to 12-31-42:		
Sewer & Water	$ 1,920.94	
Repairs	4,386.16	
Taxes & Assessments	19,019.58	
Insurance & Title Expense	4,941.47	
Rental & Miscl. Expense	3,724.59	
Golf Course Expense	.85	
Liability Insurance & Agents Bonds	752.19	
	$ 34,745.78	
Real Estate Sales — Close Outs—Arizona		8,503.23
Other States		*1.10*
Real Estate Operating Expense—Idaho		2,288.38
Real Estate Operating Expense—California		*411.74*

Figures in italics typed in red.

Receiver's Liquidating Expense—Arizona		233,740.45
		[211]
Receiver's Liquidating Expense from 1-1-40 to 12-31-42:		
Receiver's Salary	$ 15,100.00	
Legal Advisors	30,455.40	
Employees Salaries	19,884.45	
Printing Supplies & Stat.	411.71	
Rent	2,754.00	

Debits—(Continued)		
Telephone, Telegraph, Postage	850.97	
Travel Expense	1,183.60	
Office Equip. & Maintenance	64.47	
Court Costs & Fees	51.32	
Bonds	601.07	
Insurance	333.65	
Miscellaneous Items	239.93	
Appraisal Fees	497.00	
Social Sec. & Unemp. Tax	689.83	
	$ 73,117.40	
Expense—California		$ 3,316.62
Expense—Idaho		6,572.35
Expense—Utah		138.97
Expense—Oregon		2,222.88
Loss on Realization—Arizona		165,614.36
Loss on Realization—Other States		62,391.60
Real Estate Abandoned—Idaho		14,888.40
Receiver's Set-Offs in Liquidation		17,429.81
Attorneys Fees (Services Prior to Receivership)		8,201.21
Master's Expense (Claims hearing & report)		1,408.47
		$3,119,226.76

CREDITS

Defeciancy Judgments—Uncollected		$ 50,747.70
Receiver's Income		217,121.04
Receiver's Income from 1-1-40 to 12-31-42:		
Rents	$ 46,239.50	
Golf Course	96.00	
Real Estate Loans—Interest	609.26	
Real Estate Contracts — Interest	7,133.78	
Notes & 2nd Mort.—Interest	163.62	
Accts. Rec. & Judg.—Interest	116.42	
	$ 54,358.58	

Credits—(Continued)	
Dividend Account—Wyoming (Transfer)	60.07
Interest—Other States	2,958.59
Real Estate Operating—Other States	2,149.22
Receiver's Income—Gain on Realization	20,211.62
General Suspense	*12.95*
Figures in italics typed in red.	
Trust Accounts — Payments after Receivership	55.00
Accrued Int. Uncollected (12-31-33) Other States	39,772.71
Reserve for Maturities	150,029.91
Permanent Reserve Fund Stock	87,671.42
	[212]
General Surplus	75,813.12
Stock Suspence — Certificates	31,565.22
Investment Certificates	2,045,036.44
Coupon Stock	79,342.01
Fully Paid Certificates	268,894.35
Extra Payments on Certificates	13,311.65
Pass Books Saving Certificates	34,499.64
	$3,119,226.76

III.

On December 31, 1939 the Real Estate Loans in Arizona showed a balance of $5,984.88. The status of these loans as of December 31, 1942, is set forth in the following Schedule "B"—"Real Estate Loans", showing a balance of $50.23. This amount represents balance on Loan No. 357 on Lot 1, Block 1, Wilson Addition to Winslow, and is not collectible as the property was abandoned by mortgagee on account of accumulated back taxes:

SCHEDULE "B"—REAL ESTATE LOANS

		Balance Due 12-31-39	Collected	Balance Due 12-31-42
6	Active Loans	$5,934.65	$	
1	Inactive Loan	50.23		$ 50.23
6	Loans Paid in Full		5,934.65	
		$5,984.88	$5,934.65	$ 50.23

IV.

On December 31, 1939, Real Estate Contracts showed a balance of $53,099.62, covering forty-seven individual contracts. Forty-five have been paid in full to December 31, 1942. Since December, 31, 1939 twenty-six pieces of real estate have been sold for an original amount of $42,025.00. All contracts, excepting Contract #160 Idaho with an unpaid amount of $592.25, are up to date with payments being made regularly in accordance with the terms of the contracts. The status of the contracts as of December 31, 1942 is set forth in the following Schedule "C"— [213]

SCHEDULE "C"—REAL ESTATE CONTRACTS

47	Contracts—Principal unpaid balance 12-31-39	$ 53,099.62
26	Sold under contract from 12-31-39 to 12-31-42	42,025.00
		$ 95,124.62
48	Paid in full (prin. collected 12-31-39 to 12-31-42)	71,309.72
25	With balance unpaid as of 12-31-42	$ 23,814.90

V.

On December 31, 1939, Real Estate Owned showed a balance of $363,312.68 covering forty-nine pieces

of property. From December 31, 1939 to December 31, 1942 five pieces of property were sold for cash in the amount of $44,300.00 and twenty-six pieces were sold under contract for $42,025.00. The Real Estate Owned, Schedule "D", for the period covered by this report is given below:

SCHEDULE "D"—REAL ESTATE OWNED

			Book Value
49	pieces owned as of 12-31-39		$363,312.68
26	pieces sold under contract for	$42,025.00	
5	pieces sold for cash	44,300.00	
31			
	Loss on Book Value	48,900.96	
31			135,225.96
18	on hand 12-31-42		$228,086.72

VI.

A tabulation of the totals of the sale prices, appraised values, book values and losses from book values is given below in Schedule "E":

SCHEDULE "E"

	Sale Price	Appraised Value	Book Balance	Book Loss
26 Contract Sales	$42,025.00	$ 44,621.00	$ 72,517.17	$ 30,178.62
5 Cash Sales	44,300.00	58,670.40	62,708.79	18,722.34
	$ 86,325.00	$103,291.40	$135,225.96	$ 48,900.96

[214]

VII.

Promissory Notes and Second Mortgages having a balance of $3,346.72 as of December 31, 1939, have been reduced to a balance of $2,501.43 as of December 31, 1942, as shown in Schedule "F" below. The major portion of the present balance is not collectable owing to foreclosure by the H.O.L.C. of the properties covered by the notes and second mortgages and the re-sale by them at prices which left no equity in the paper held by this Association.

SCHEDULE "F"

		Amount Due 12-31-39	Collected	Amount Due 12-31-42
12	Uncollected or Collected in part	$2,844.98	$ 343.55	$2,501.43
4	Collected in full	486.78	486.78	
1	Adjusted	14.96	14.96	
		$3,346.72	$ 845.29	$2,501.43

VIII.

Some payments have been made on the Deficiency Judgments, but the major portion are not collectable. Balances and collections for the period covered by this report are tabulated in Schedule "G" below:

SCHEDULE "G"—DEFICIENCY JUDGMENTS

Balance *of* of December 31, 1939	$ 50,496.71
Amount Collected	1,704.32
Balance as of December 31, 1942	$ 48,792.39

IX.

Accounts Receivable at December 31, 1939, amounted to $9,523.00 for Arizona. Of this amount $1,831.80 was an account charged to M. E. Waddoups. An attempt to enforce collection was [215] made through Cause No. 44001. The Court ordered that the "plaintiff take nothing". The remainder of the account, $7,691.20 as of December 31, 1939, was the principal amount due from J. A. Swanson on the sale of the Canadian assets. Since that time $97.67 has been collected as interest and $12.61 collected as principal, leaving a balance due on June 30, 1942, of $7,678.59.

X.

Furniture and Fixtures as of December 31, 1939, were carried at $11,421.86. Nine old chairs and three small tables were sold for $23.00, and one typewriter requisitioned by the U. S. Government for a price of $20.00, leaving the balance of the account as of December 31, 1942, $11,378.86.

XI.

California: The Building & Loan Commissioner of the state of California in his "Intermediate Financial Statement as of December 31, 1941, and Petition for Approval and Instructions" to the Superior Court of the state of California, included the following Balance Sheet as of December 31st, 1941:

	Guaranty Fund	Regular Fund	Total
Assets:			
Cash in Banks	$ 32,420.82	$ 20,632.96	$ 53,053.78
S. F. Harbor Bonds	90,000.00	.—	90,000.00
Loans	.—	2,355.91	2,355.91
Real Estate	.—	2,799.70	2,799.70
Certificate Loans	15,282.01	325,184.92	340,466.93
Advance to Liquidating Office	.—	105.34	105.34
	$137,702.83	$351,078.83	$488,781.66

[216]

Liabilities:			
Advance from borrowers	$.—	$ 14.77	$ 14.77
Approved Claims	151,393.68	3,987,383.30	3,138,776.98
Interest on Accrued Claims	73,893.41	1,445,237.91	1,519,131.32
Deficit	87,584.26	4,081,557.15	4,169,141.41
	$137,702.83	$351,078.83	$488,781.66

XII.

Idaho: From January 1, 1940, to December 31, 1942, operating costs and collections for the state of Idaho were as follows:

ASSETS—STATE OF IDAHO—DEC. 31, 1942

Contracts	$ 857.88	
Real Estate Owned	2,148.70	
Certificate Loans	43,449.19	
	$ 46,455.77	
Expenses, Insurance, Titles & Miscellaneous		$ 366.87
Rents Collected		420.13
Operating Gain		$ 53.26

XIII.

Utah: James L. White, Receiver in Utah, has reported to me that the following is a statement of the assets and liabilities in the state of Utah as of December 31, 1941:

Assets:		
Cash in Banks		$201,390.55
Real Estate Loans		36,622.82
Real Estate Contracts		42,844.04
Real Estate Owned		8,060.48
Other Assets		234.92
Total Assets		$289,152.81
Liabilities:		
Intermountain Bldg. & Loan Ass., Harry W. Hill, Receiver		412,709.39
First National Bank (amount in said bank & Not Included in Item Immediately Above		2,098.77
		$414,808.16
		[217]
Deduct Liquidation Losses as follows:		
For year 1936	$ 64,593.03	
For year 1937	32,889.21	
For year 1938	15,072.20	
For year 1939	6,864.20	
For year 1940	2,233.79	
For year 1941	4,002.92	125,655.35
Total Liabilities		$289,152.81

XIV.

Oregon: Report of the Building & Loan Commissioner for the state of Oregon shows the following assets and liabilities of the association, as of September 30, 1942, for the state of Oregon:

Assets:		
Cash		$ 74,584.92
State Treasurer Bonds		107,637.44
Home Owners Loan Corporation Bonds		56,175.00
Accounts Receivable		6,515.89
Notes and Claims Receivable		299.72
Real Estate Mortgage Loans		3,679.94
Real Estate Contracts		56,278.23
Real Estate Owned		40,329.13
Certificate Loans		17,837.97
Deferred Debits		371.20
Furniture and Equipment		258.36
Total Assets		$363,967.80
Liabilities:		
Deferred Credits		$ 200.00
Taxes Payable		2,845.31
Accounts Payable		435.55
Stock Payments Held in Trust		2.45
Members' Investments		215,433.48
Intermountain Head Office	$341,348.51	
Less Deficit	220,558.60	120,789.91
Liquidation Surplus		24,261.10
Total Liabilities		$363,967.80

XV.

Wyoming: John T. Boyd, Receiver in Wyoming, in compliance with an order of the District Court of the United States [218] for the District of Wyoming, made a distribution of the assets in the state of Wyoming to the resident certificate holders of that state who had filed claims with him. The dividend was for 16½% on adjusted values, which did not include the addition of interest to the date of receivership as figured by this office and approved by this Court. The total amount paid was

$63,901.03, and a balance left, after expenses of $60.07, was transferred to the Arizona Receiver.

A synopsis of the Wyoming dividend payments as they apply to my records of Wyoming Certificate Holders follows:

Unfiled in Arizona	$68,520.83	(Wyoming paid	$ 2,660.05	on	$ 17,721.62
		(Wyoming paid	.—	on	50,779.21
Filed in Arizona	$510,717.41	(Wyoming paid	$61,240.98	on	$406,083.50
		(Wyoming paid	.—	on	104,633.91
	$579,238.24		$ 63,901.03		$579,238.24

XVI.

On the 23rd day of July, 1940, I filed with this Court my report of claims of Creditors, Investors, Shareholders and others, aggregating approximately 3,012 claimants, and with said report filed a petition praying for order for the allowance or disallowance of each of the several claims filed. It was ordered that my petition be referred to Neil C. Clark, Special Master in Chancery. The Special Master reviewed all matters for the determination of which my petition prayed, and on filing his report with this Court was sustained in his findings in all matters excepting as to off-sets of loans against certificates pledged as security. I was ordered to disregard the Master's suggestion in this respect and make distribution in accordance with the Utah [219] statute which disallows off-sets of the character under discussion.

In accordance with the recommendations of the Special Master and the approval of this Court,

interest has been figured and added to the date of receivership on certificates which had matured prior to March 22, 1934, the date of receivership.

Total liabilities to certificate holders as of the final date covered by my previous report are listed below in Classes of Stock, and since this Court's approval of the Master's report eliminates preference of one class of stock over any other class, the present liability to the certificate holders, with interest added to date of receivership, immediately follows, with all classes of stock listed as to states in which application therefor was made:

TOTAL LIABILITIES TO CERTIFICATE HOLDERS AS OF DECEMBER 31, 1939.

Stock Suspense Certificates	$ 31,565.22
Investment Certificates	2,045,036.44
Coupon Stock	79,342.01
Fully Paid Certificates	268,894.35
Extra Payments on Certificates	13,311.65
Pass Book Savings Certificates	34,499.64
	$2,472,649.31

TOTAL LIABILITIES TO CERTIFICATE HOLDERS AS OF DECEMBER 31, 1942

States	Preferred Claims Trust Payments	Certificates Adjusted Value
Arizona	$ 27.50	$1,038,944.09
California	.—	70,119.78
Idaho	.—	427,041.44
Oregon	.—	260,629.29
Utah	.—	711,675.98
Wyoming	27.50	579,238.24
Miscl. States	.—	54,840.31
	$ 55.00	$3,142,489.13

[220]

Certificate Loans against foregoing certificates are as follows:

States	Principal	Interest to 3-22-34	Total
Arizona	$116,741.66	$ 21,193.91	$137,935.57
California	660.00	95.69	755.69
Idaho	37,041.28	6,407.91	43,449.19
Oregon	14,711.96	2,607.65	17,319.61
Utah	65,424.03	12,622.35	78,046.38
Wyoming	49,863.66	11,842.83	61,706.49
Miscl. States	2,540.75	839.36	3,380.11
	$286,983.34	$ 55,609.70	$342,593.04

Total expense of the Special Master was $1,408.47. $1,375.00 of this was a fee to the Master for his services, and $33.47 was spent for stamps, printing and stationery.

XVII.

The litigation in Oregon over assets in that state which had been taken over by the Corporation Commissioner mentioned in paragraph XVI of my report filed in this court on March 20, 1940, was determined by the Circuit Court of Appeals for the Ninth Circuit in favor of the Corporation Commissioner and in favor of the Oregon certificate holders. After the adverse decision of the Circuit Court of Appeals for the Ninth Circuit your Receiver petitioned the Supreme Court of the United States for a writ of certiorari, which petition was denied.

XVIII.

The litigation in California over assets in that state which had been taken over by the Building and Loan Commissioner mentioned in paragraph

XVII of my report filed in this court on March 20, 1940, was determined by the Circuit Court of Appeals for the Ninth Circuit in favor of the Building and Loan Commissioner and in favor of the California certificate holders. After [221] the adverse decision of the Circuit Court of Appeals for the Ninth Circuit your Receiver petitioned the Supreme Court of the United States for a writ of certiorari, which petition was denied.

XIX.

On April 18th, 1941, your Receiver, with C. M. Berge, Auditor for Arizona Receiver; Lawrence L. Howe, Attorney for Arizona Receiver, met with James L. White, Receiver in Utah; Willard H. Wirtz, Executive Secretary and Chief Counsel for Oregon Commissioner; W. J. P. Farrell, Oregon Savings & Loan Supervisor; Rollin L. McNitt, Special Deputy. Building & Loan Commissioner for California; Alan G. Campbell, Attorney for California Building & Loan Commissioner, and R. L. McNitt, Jr., Manager Claims Department of California Commissioner. This meeting was held in Los Angeles for the purpose of coordinating efforts towards liquidation by working out problems and conflicts, and determine a basis of procedure which would avoid duplication of dividend payments on filings of claimants in the several offices.

Following this meeting the Commissioners of the states of California and Oregon proceeded with a determination of who could qualify as resident

certificate holders of their respective states in accordance with their Court's rulings.

In April, 1942, I received from the California Building & Loan Commissioner his full and complete schedule as approved by the Superior Court of the State of California. A condensed outline of this schedule shows the following acceptances in whole and in part as applicable for payment from the California Guaranty Fund. [222]

Accounts Originating in	Total Adjusted Value	Adjusted Value Accepted in Full or Part	Accepted as to California Guar. Fund	Rejected as to California Guar. Fund
Arizona	$1,038,971.59	$ 70,193.29	$ 44,532.95	$ 25,660.34
California	70,119.78	55,042.92	54,759.20	283.72
Idaho	427,041.44	13,987.12	10,345.36	3,641.76
Oregon	260,629.29	6,523.25	3,615.29	2,907.96
Utah	711,675.98	38,536.92	24,649.46	13,887.46
Wyoming	579,265.74	14,435.09	11,409.24	3,025.85
Misel. States	54,840.31	3,098.24	2,584.47	513.77
	$3,142,544.13	$201,816.83	$151,895.97	$ 49,920.86

The Oregon Schedule was received from Lloyd R. Smith, Corporation Commissioner, on October 12th, 1942, and shows the following acceptances and rejections as to the Guaranty Fund in that state:

Accounts Originating in	Total Adjusted Value	Adjusted Value Accepted in Full or Part	Accepted as to Oregon Guar. Fund	Rejected as to Oregon Guar. Fund
Arizona	$1,038,971.59	$ 2,943.54	$ 1,286.40	$ 1,657.14
California	70,119.78	.—	.—	.—
Idaho	427,041.44	15,049.72	7,496.59	7,553.13
Oregon	260,629.29	223,282.52	204,867.79	18,414.73
Utah	711,675.98	4,648.98	3,780.69	868.29
Wyoming	579,265.74	1,588.18	673.14	915.04
Miscl. States	54,840.31	635,76	111.87	523.89
	$3,142,544.13	$248,148.70	$218,216.48	$ 29,932.22

It is the understanding of your Receiver that the California Commissioner (now Mr. Harley Hise) paid a 50% dividend to the resident certificate holders of California from the Guaranty Fund on or about July 17th, 1942, and that he proposes to pay a second 50% in January, 1943, or as soon thereafter as may be; that after the payment of this second 50% there will remain a residue in the General Assets in the state of California, in a probable amount of between $20,000.00 and $30,000.00, which it is proposed to remit to your Receiver for distribution.

From correspondence with Mr. Lloyd R. Smith, Corporation [223] Commissioner of the state of Oregon, it does not appear that there is a definite and distinct line of demarcation between "Guaranty Fund" and the "General Assets" in that state. It does appear, however, that the Commissioner is determined to distribute the proceeds of all assets in the state of Oregon; that after the distribution is made from the said "Guaranty Fund", it is the intention of the Commissioner to see that the Oregon resident certificate holders share in the General Assets to the same extent as the Arizona creditors, or until 100% of the adjusted value of their account is repaid.

XX.

Your Receiver further represents that on April 6, 1942, the Building and Loan Commissioner for the state of California filed a petition for approval of schedule of claims, for approval of his accounts, and for instructions, and in said petition, among other other things, asked the Superior Court of Los An-

geles County, California, for authority to pay interest at the rate of 7% per annum on all claims payable from the Guaranty Fund of that state until such claims shall have been paid in full, together with interest at the rate of 7% per annum to the date of final payment; to this petition your Receiver appeared and filed objections to the payment of any interest after March 22, 1934, on the theory that it would be unfair and inequitable to other investors and creditors of the association who are non-residents of California and who are not in anywise protected by the Guaranty Fund of that state. This matter was argued by counsel for your Receiver and on the 9th day of May, 1942, the Superior Court of Los Angeles County, California, entered an order sustaining your Receiver's objections to the payment of any interest accruing after March 22, 1934. [224]

XXI.

That on or about the 1st day of May, 1942, the Corporation Commissioner of the State of Oregon filed his Petition No. 340 for instructions and directions, which was set for hearing on the 3rd day of June, 1942, to which petition your Receiver filed an appearance and objections, and at said hearing held on the 3rd day of June, 1942, your Receiver appeared by counsel in support of his objections, and the judge, after taking said matter under advisement, overruled all of your Receiver's objections except the objection as to the payment of interest after the date of receivership and ordered distribution to be made by the Corporation Commissioner of the state

of Oregon in accordance with the so-called "chancery rule". Upon the advice of counsel your Receiver did not appeal from that order.

XXII.

That the following cases mentioned in paragraph XIX of your Receiver's report filed herein on March 20, 1940, are in the same condition as they were at the time such report was filed.

H. S. McCluskey v. Henry Parks, an action in the West Phoenix Precinct to collect delinquent rental in the sum of $131.00; and H. S. McCluskey v. W. L. Burnham, in the Justice Court at Mesa, to recover $23.50 delinquent rent.

XXIII.

That the action entitled "Harry W. Hill, Receiver, v. United States Fidelity & Guaranty Company, a corporation", No. Civil. 10—Phoenix, mentioned in paragraph XXII of your Receiver's report filed herein on March 20, 1940, was settled by your Receiver for $12,500.00, which sum your Receiver has received from United States Fidelity & Guaranty Company. [225]

XXIV.

That A. H. Favour and A. S. Baker filed a claim with your Receiver against the assets of the Association for $1,000.00, interest and costs, which was disallowed by the Special Master in his report dated December 7, 1940 and filed herein *or* or about the 17th day of December, 1940; that thereafter by an order of this Honorable Court in this matter excep-

tions to the Master's Report filed by said Favour and said Baker were on the 30th day of January, 1941, overruled; thereafter an appeal was taken to the Circuit Court of Appeals for the Ninth Circcuit by said Favour and said Baker, and the case was reversed "with directions to allow appellants' (Favour and Baker) claim;" that Favour and Baker have applied to this court for an order that such claim be given preference and priority over general creditors, and such application has been denied by this Court, but the question of an appeal from said order or an application to the Circuit Court of Appeals for a more explicit direction in its mandate is still pending.

Wherefore, your petitioner prays that in accordance with said petition this report and account of the receivership and his conduct in the premises be approved and allowed; that this Honorable Court fix a date for a hearing on said report and that due notice of the filing of this report be given in the form and manner fixed by the Court; that upon hearing thereof such report be approved and for such order as the Court may deem meet and proper in the premises.

HARRY W. HILL

Receiver of Intermountain Building & Loan Association, an Utah corporation.

LOUIS B. WHITNEY

Attorney for Receiver. [226]

State of Arizona
County of Maricopa—ss.

Harry W. Hill, of lawful age, being first duly sworn, upon his oath deposes and says: That he is Receiver of the Intermountain Building & Loan Association, an Utah corporation, and petitioner above; that he has read the above and foregoing report and account, and petition, and knows the contents thereof, and that the same is true to the best of his knowledge and belief, except as to those matters alleged upon information and belief, and as to such matters he believes it to be true.

HARRY W. HILL

Subscribed and sworn to before me this 20th day of February, 1943.

(Seal) G. H. DUDLEY
Notary Public

My Commission Expires: May 9, 1945.

[Endorsed]: Filed Feb 23 1943 [227]

[Title of District Court and Cause.]

NOTICE OF APPEAL OF ELIZABETH G. MONAGHAN

Notice is hereby given that Elizabeth G. Monaghan, attorney for the petitioning creditors above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the Final Order fixing attorneys' fees and expenses and ordering payment of balance due, entered in the

above entitled matter on December 7, 1942, and from the whole thereof.

Dated at Phoenix, Arizona, this 4th day of March, 1943.

H. S. McCLUSKEY
Attorney for Elizabeth G. Monaghan
Address: 405 Ellis Building, Phoenix, Arizona.

[Endorsed]: Filed Mar 5, 1943 [228]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents:

That we, Elizabeth G. Monaghan, petitioner in the Petition for allowance of attorneys' fees for legal services rendered and expenses incurred and expenses for which the attorneys became obligated, in the preparation and trial of the above entitled suit, who is appealing, as principal, and Fidelity and Deposit Company of Maryland, a corporation duly authorized to do business as a surety company within the County of Maricopa, State of Arizona, as surety, are held and firmly bound unto Harry W. Hill, as Receiver of Intermountain Building & Loan Association, an Utah corporation, and Harry W. Hill, as Trustee of and for Guadalupe R. Gallegos, Francesca Gallegos, his wife, Inga G. Gudmundsen, and Mata E. Dexter, in their own behalf and in behalf of others

similarly situated, respondent in said matter, in the sum of Two Hundred Fifty and No/100 Dollars ($250.00), lawful money of the United States of America, for the payment of which, well and truly to be made, we bind ourselves, our successors and legal representatives, jointly and severally by these presents. [229]

In Witness Whereof, said principal and surety have respectively caused these presents to be signed and executed by her and its duly authorized agent and attorney this 2nd day of March, 1943.

The condition of the above bond is such that:

Whereas: in The District Court of the United States, for the District of Arizona, on the 7th day of December, 1942, said court entered its Final Order fixing attorneys' fees and expenses, and ordering payment of balance due; and

Whereas, the said Elizabeth G. Monaghan, as petitioner in said matter, is desirous of appealing to the United States Circuit of Appeals for the Ninth Circuit, from said Final Order and the whole thereof; and

Whereas, under the provisions of Rule 73(c), Rules of Civil Procedure for the District Court of the United States, a bond on appeal is required to be filed in the sum of Two Hundred Fifty and No/100 Dollars ($250.00);

Now, Therefore, if the said Elizabeth G. Monaghan, as such petitioner, will prosecute her appeal with effect, and in case the judgment of the United

States Circuit Court of Appeals for the Ninth Circuit shall be against her, that she will pay all costs that may accrue in said court by reason of her appeal, (no costs having accrued against the petitioner in the said District Court of the United States for the District of Arizona), then this obligation shall be null and void and of no effect.

Dated this 2nd day of March, 1943.

ELIZABETH G. MONAGHAN
Principal
FIDELITY AND DEPOSIT
COMPANY OF MARYLAND
By C. A. DRUMMOND (Seal)
Attorney in Fact, Surety

Approved this 5th day of March, 1943.

DAVE W. LING, Judge

[Endorsed]: Filed Mar 5 1943 [230]

[Title of District Court and Cause.]

ORDER THAT ORIGINAL PORTIONS OF EXHIBIT No. 6, BE SENT TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT IN LIEU OF COPIES THEREOF, IN THE APPEAL OF ELIZABETH G. MONAGHAN.

It appearing to the court, and the court being of the opinion, that the original parts of petitioner Nealon's Exhibit No. 6, being miscellaneous bills, receipts and checks, filed December 20, 1937, as set

out as item (3) in the Designation of Additional Portions of the Record Proceedings and Evidence to be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit to be contained in the record on appeal, filed by Harry W. Hill, as Receiver of Intermountain Building & Loan Association on March 16, 1943, should be inspected by the United States Circuit Court of Appeals for the Ninth Circuit and sent to said court in lieu of copies thereof, in connection with the appeal of Elizabeth G. Monaghan herein from the Final Order fixing attorney's fees and expenses, and ordering payment of balance due, entered on December 7, 1942, and from the whole thereof;

It Is Hereby Ordered that in accordance with Rule 75 (i), Rules of Civil Procedure for the District Courts of the United States, the clerk of this court shall send to the United States Circuit Court of Appeals for the Ninth Circuit, the original [234] parts of petitioner Nealon's Exhibit No. 6, being miscellaneous bills, receipts and checks, filed December 20, 1937, as set out as item (3) in the Designation of Additional Portions of the Record Proceedings and Evidence to be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit to be contained in the record on appeal, filed by Harry W. Hill, as Receiver of Intermountain Building & Loan Association on March 18, 1943, in lieu of copies thereof, in connection with the appeal of Elizabeth G. Monaghan to said United States Circuit Court of Appeals for the Ninth Circuit; and that the clerk of this court shall be responsible for the safekeeping,

transportation and return of said original parts of said Exhibit No. 6.

Done in open court this 22 day of March, 1943.

DAVE W. LING
Judge

[Endorsed]: Filed Mar 22 1943. [235]

In the United States District Court
for the District of Arizona

April 1943 Term At Phoenix

MINUTE ENTRY OF
MONDAY, APRIL 12, 1943

(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, presiding.

E-268

[Title of Cause.]

On motion of H. S. McCluskey, Esquire, counsel for appellant, Elizabeth G. Monaghan,

It is Ordered that said appellant's time in which to file the record on appeal herein and to docket the action in the Circuit Court of Appeals for the Ninth Circuit be extended ten days from April 14, 1943.

[236]

In the District Court of the United States
for the District of Arizona

No. E-268—Phoenix

GUADALUPE R. GALLEGOS, et al.,
Plaintiffs,

vs.

INTERMOUNTAIN BUILDING & LOAN ASSOCIATION, a corporation,
Defendant.

AMENDED DESIGNATION OF PARTS OF RECORD TO BE TRANSMITTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, ON THE APPEAL OF ELIZABETH G. MONAGHAN.

To the Clerk of the United States District Court for the District of Arizona:

You are hereby notified that Elizabeth G. Monaghan, who is appealing, deems the following papers and portions of the record necessary to present the questions involved on the appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit, from the final order fixing attorneys' fees and expenses, and ordering payment of balance due to Elizabeth G. Monaghan, entered in said matter on December 7, 1942, and from the whole thereof; and

You are hereby requested to include in the record to be transmitted to said United States Circuit Court

of Appeals for the Ninth Circuit on said appeal, the following papers and portions of the record, to-wit:

1. Amended bill of complaint, filed June 23, 1933;

2. Affidavit of James A. Smith, filed April 18, 1933;

3. Decision of the United States Circuit Court of Appeals, dated August 5, 1935; (Case No. 7516 in said court, and reported in 78 Fed. (2) 972); [237]

4. Order of the United States Supreme Court denying certiorari; (206 U.S. 639)

5. Mandate of the United States Circuit Court of Appeals for the Ninth Circuit in Case No. 7516, entered in the above captioned matter on December 2, 1935;

6. Petitioner Monaghan's Exhibit "B" in evidence, including statement of James A. Smith attached thereto;

7. Paragraph XL, page 41, of Petitioner Nealon's Exhibit No. 3 in evidence;

8. Exhibit No. 4 in evidence, deposition of William H. Burges;

9. Final Order fixing attorneys' fees and expenses, and ordering payment of balance due, (as to Elizabeth G. Monaghan) entered December 7, 1942;

10. Final Order fixing attorneys' fees and expenses, and ordering payment of balance due, (as to Thomas W. Nealon) entered December 7, 1942;

11. Findings of Fact and Conclusions of Law, made nunc pro tunc as of December 7, 1942;

12. Stipulation dated March 5, 1943, as to filing

of Findings of Fact and Conclusions of Law, nunc pro tunc;

13. Original Reporter's transcript of evidence on hearing of petitions of Elizabeth G. Monaghan and Thomas W. Nealon;

14. Notice of Appeal;

15. Bond on Appeal;

16. This Amended Designation;

17. Statement of Points to be relied on;

18. Scehdules "A", Trial balance as of December 31, 1939; "B", Real Estate Loans, December 31, 1939; "C", Real Estate Contracts, December 31, 1939; "D", Real Estate owned, December 31, 1939; and "E", Real Estate sold, December 31, 1939, all attached to verified Report [238] and Account of Harry W. Hill, as Receiver of Intermountain Building & Loan Association, an Utah corporation, filed March 20, 1940;

19. Report and Account of Harry W. Hill, as Receiver of Intermountain Building & Loan Association, an Utah corporation, filed February 23, 1943;

Dated at Phoenix, Arizona, this 18th day of March, 1943.

HENRY S. McCLUSKEY
Attorney for Elizabeth G. Monaghan

Received copy of the within and foregoing Amended Designation, this 18th day of March, 1943.

LOUIS B. WHITNEY
Attorney for Harry W. Hill, as Receiver and as Trustee.

[Endorsed]: Filed Mar 18 1943. [239]

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE TRANSMITTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO BE CONTAINED IN THE RECORD ON APPEAL

To: The Clerk of the United States District Court for the District of Arizona:

You are hereby requested, pursuant to the provisions of Federal Rule 75 (a) of Federal Rules for Civil Procedure, to incorporate into the transcript of record on appeal herein, in addition to the portions of the record indicated by appellant herein by her amended designation to be included in the transcript of the record herein, the following:

(1) All of petitioner Nealon's Exhibit No. 3, being the petition of Thomas W. Nealon for attorney's fees, excepting paragraph XL, page 41, of petitioner Nealon's Exhibit No. 3, which has already been designated by appellant, filed December 20, 1937.

(2) Petitioner Nealon's Exhibit No. 5—being the deposition of Judge Samuel L. Pattee—filed December 20, 1937.

(3) Those parts of petitioner Nealon's Exhibit No. 6, being miscellaneous bills, receipts and checks, filed December 20, 1937, particularly designated as follows:

(a) Check of Thomas W. Nealon, dated March 20, 1933, numbered 2388, drawn on The Phoenix National Bank, hoenix, Arizona, payzona, payable to the order of Brady & Acheson in the amount of $20.00; together with invoice of Brady & Acheson in such amount addressed to Mrs. Elizabeth G. Monaghan, dated March 15, 1933, covering "Services in re Intermountain Building & Loan Association to date".

(b) Check of Thomas W. Nealon, dated March 22, 1933, numbered 2391, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to the order of Brady & Acheson in the amount of $5.00; together with invoice of Brady & Acheson in such amount addressed to Mrs. Elizabeth G. Monaghan covering "Services in obtaining building and loan report".

(c) Check of Thomas W. Nealon, dated April 25, 1933, numbered 2439, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to Elizabeth G. Monaghan in the amount of $12.00, with notation in upper left-hand corner "Marshal's services", endorsed "Pay to Helen Erickson—E. G. Monaghan"; together with statement of United States Marshal rendered to Elizabeth G. Monaghan covering services rendered April 18, 1933, and showing receipt of payment April 26, 1933.

(d) Check of Thomas W. Nealon, dated March 23, 1933, numbered 2394, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to Mrs. S. A. Nelligan in the amount of

$5.00; and unnumbered check of Thomas W. Nealon, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to Mrs. S. A. Nelligan in the amount of $12.00; together with notation accompanying above checks "Nelligan—clerical work $17.00).

(e) Check of Thomas W. Nealon, dated April 22, 1933, numbered 2437, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to the order of Arizona Corporation Commission in the amount of $9.00, with notation in upper left-hand corner "cert. copy of incorp Intermountain Bldg. & Loan Assn. Utah"; together with official receipt of Arizona Corporation Commission, numbered 51206, dated April 22, 1933, evidencing payment of $9.00, made to Thomas W. Nealon, covering certified copy of articles of incorporation "In re: Intermountain Building & Loan Assn." Receipt shows payment by check No. 2437.

(f) Check of Thomas W. Nealon, dated May 22, 1933, numbered 2453, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to the order of County Recorder of Maricopa County in the amount of $3.35; together with official receipt of County Recorder dated May 22, 1933, to Thomas W. Nealon, covering certified copy of mortgage—Vaughn Riggins, et ux. to Intermountain Bldg. & Loan Assn.

(g) Unnumbered check of Thomas W. Nealon, dated May 14, 1933, drawn on The Phoenix National Bank, Phoenix, Arizona, pay-

able to the order of S. A. Nelligan in the amount of $25.75, endorsed by S. A. Nelligan and cashed in Salt Lake City, Utah. [241]

(4) This designation.

Dated at Phoenix, Arizona, this 18th day of March, 1943.

LOUIS B. WHITNEY,
Attorney for Harry W. Hill, as Receiver of Intermountain Building & Loan Association, an Utah corporation, Appellee.

1006 Luhrs Tower
Phoenix, Arizona.

Due service of the within, by copy, acknowledged this 18th day of March, 1943.

HENRY S. McCLUSKEY,
Attorney for Appellant.

[Endorsed]: Filed Mar. 18, 1943. [242]

[Title of District Court and Cause.]

STIPULATION RE RECORD ON APPEAL

It Is Stipulated by and between the petitioner Elizabeth G. Monaghan, through her attorney Henry S. McCluskey, Esquire, and Harry W. Hill, as Receiver of the Intermountain Building & Loan Association, an Utah corporation, through his attorney Louis B. Whitney, Esquire, that in prepar-

ing the record it will not be necessary for the clerk to include therein the hypothetical questions propounded to the witness Samuel A. Pattee in his deposition, for the reason that said hypothetical questions are identical in form and substance to those propounded to the wtiness William H. Burgess in his deposition, and that the same questions may be considered by the Circuit Court of Appeals for the Ninth Circuit as being asked the witness Samuel A. Pattee.

It Is Further Stipulated between the parties that the decision of the United States Circuit Court of Appeals for the Ninth Circuit, dated August 5, 1935, which is designated in appellant's designation as part of the record, need not be included by the clerk in the transcript and need not be printed by the Clerk of the Circuit Court of Appeals for the Ninth Circuit, as the same is fully reported in 78 Fed. (2d) [243] at page 972, et seq.

It Is Further Stipulated that the order of the United States Supreme Court denying writ of certiorari, reported in 206 U. S. at page 639, need not be included in the record, and may be considered by the United States Circuit Court of Appeals for the Ninth Circuit in consideration of this appeal, should said order be considered pertinent.

This stipulation is entered into for the purpose of shortening the record, and it is further stipulated that this stipulation be included in said record.

Dated at Phoenix, Arizona, this 9th day of April, 1943.

HENRY S. McCLUSKEY,
Attorney for Elizabeth G. Monaghan, Appellant.

LOUIS B. WHITNEY,
Attorney for Harry W. Hill, Receiver of Intermountain Building & Loan Association, an Utah corporation.

[Endorsed]: Filed Apr. 9, 1943. [244]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD ON APPEAL

United States of America,
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of said Court, including the records, papers and files in the case of Guadalupe R. Gallegos, et al, plaintiffs, versus Intermountain Building & Loan Association, a corporation, numbered E-268 Phoenix, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 244, inclusive, contain a full, true and correct transcript of the proceedings had in said cause, and of all the papers filed therein, together with the endorsements of filing thereon, called for and designated in Appellant's Amended Designa-

tion of Parts of Record to be Transmitted to the United States Circuit Court of Appeals, and Appellee's Designation of Additional Portions of the Record, Proceedings and Evidence filed herein and made a part of the transcript attached hereto, (except portions of petitioner Nealon's Exhibit 6, the originals of which are transmitted herewith pursuant to order of the court) as the same appear from the originals of record remaining on file in my office as such Clerk, in the City of Phoenix, State and District of Arizona.

I further certify that the original Reporter's Transcript filed in said cause is transmitted herewith.

I further certify that the Clerk's fee for preparing and certifying this said transcript of record amounts to the sum of $37.10 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said court this 21st day of April, 1943.

[Seal] EDWARD W. SCRUGGS,
Clerk
By WM. H. LOVELESS,
Chief Deputy Clerk. [245]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

The above entitled and numbered cause came on duly and regularly for hearing before Hon. Dave

W. Ling, Judge, presiding without a jury, commencing at the hour of two o'clock, P. M., on the 20th day of December, 1937.

The petitioner, Thomas W. Nealon, appeared in his own behalf.

Joseph H. Morgan, attorney at law, Prescott, Arizona, appeared on behalf of petitioner Elizabeth G. Monaghan.

Thereupon the following proceedings were had:

The Clerk: No. E-268-Phoenix.

Mr. Morgan: You Honor, I represent Mrs. Monaghan, whose petition is also filed in this matter. While separate petitions have been filed, the Monaghan petition covers both the services of Mr. Nealon and Mrs. Monaghan. I would, therefore, suggest that these two petitions be consolidated for hearing as they really constitute one matter.

The Court: Any objection to that, Judge Nealon?

Mr. Nealon: I think they should be heard separately. They both can be heard separately.

The Court: They will have to be heard separately, really.

Mr. Nealon: Yes, I think so.

The Court: But they might be consolidated?

Mr. Nealon: Oh, consolidated for the hearing?

The Court: Yes.

Mr. Nealon: Oh, yes, no objection to that.

The Court: All right. Do you want to proceed first?

Mr. Nealon: If you please. I would like to make a little statement at the opening as to why—why I

can see that the petition should have to be filed separately.

I am asking for a fee, as one of the solicitors for the plaintiffs in the class suit filed for certain named plaintiffs, and those similarly situated. I asking the Court to allow me such reasonable compensation for the services rendered [2*] to the plaintiffs, and those similarly situated, in connection with the preparation, institution and trial of the cause, including services rendered by me on the appeal from the interlocutory decree rendered by the Ninth Circuit Court of Appeals, for my services in opposing the petition of the defendant corporation and J. A. Malia in the Supreme Court of the United States, and filed upon a Writ of Certiorari, and for my out-of-pocket expenses necessarily incurred and paid by me in the sum of $1,330.40, and for services in obtaining final decree providing for the conveyance of all the property of the Intermountain Building & Loan Association to the Receiver of the defendant corporation. In this matter, Mrs. E. G. Monaghan and myself were co-solicitors for the plaintiffs. In filing this separate petition on my behalf, I followed the procedure laid down in many cases of like nature to this one which have been before the Federal Courts and the Supreme Court, in which applications for fees were made, where there were more than one solicitor representing the applicants, and who were not partners. I refer to the case of Glidden vs. Cowen, 123

* Page numbering appearing at top of page of original Reporter's Transcript.

Fed. 48; Thompson v. Bomar, 258 Fed. 339. There are many other cases as well. In these cases where the solicitors [3] were not partners—the fees were allowed to each of the applicants involved.

The soclicitors in this case, Mrs. Monaghan and myself are not, and have never been, partners in any sense of the word. My office in Phoenix was the headquarters for the conduct of this case. All pleadings, briefs, all other business was formulated and dictated by me and prepared in my office. All ordinary overhead expenses of the office during the whole period of this litigation was borne by me. All of the expenses of litigation from the time the matter came into my hands in the early part of 1932, to the time when the Receiver took physical possession in November, 1935, were advanced by me at the time they were incured or paid. Of these expense, Mrs. Monaghan, on April 30th, 1934, made a deposit of $258.00, for which she is entitled to be reimbursed by me upon payment of my out-of-pocket expenses.

Also, during the greater portion of this time; that is, during the early part of 1932, and up to about a week prior to the petition for interlocutory decree in April, 1934, Mrs. Monaghan was in my employ on a salary, but there never was at any time any partnership between us. The type of work done, the amount of work done and the time [4] spent in behalf of the plaintiffs in this suit, and the amount of overhead office expenses, and the out-of-pocket expenses necessarily paid as the preparation and the trial of the case proceeded, is only

within the knowledge of the individual performing the work, and that could only be inteligently placed before the Court in a separate petition. No one except the person rendering the service could vouch for the truth of the contents in the petition or the statement and the particular services rendered; particularly, one could not verify as to the truth of the statements in a joint petition where there was a wide divergence of opinion as to the contents in the petition form of the order, and the payment as to fees, as shown by the petition as now before the Court.

My opinion is that the only way this Honorable Court can arrive at the conclusion as to the services rendered to the plaintiffs in this case, and the value of this service is by considering the service of each of the solicitors, and the value of the service of each of those solicitors, as we done in the cases I have before cited.

My prayer in the petition is for only one-half of what would be a reasonable fee for the conduct of the case, and my petition differs from that of [5] Mrs. Monaghan in this case, in that I ask that if the Court does not see proper at this time to allow the whole fee, that it make an allowance upon account. I think the latter is proper under the circumstances of the case, and under the evidence which I shall introduce, that a partial allowance at this time is the only way in which justice can be done to all parties, considering the amount of funds in the hands of the Receiver, the necessity, I might say, of the declaring a dividend, and the fact that

it will probably be some time before all of the assets can be converted into cash. At the end of the case, at the end of the hearing I shall ask the right to file motions to that effect, and the petition along with them, so as to bring it directly before the Court, maybe supplemental to the petition already filed.

I am stating that by way of merely an introduction, if your Honor please.

As bearing upon the amounts which the Federal Courts held applicable, and do hold applicable, in cases of this kind, I have here two authenticated copies of the decrees, one made by the District Court in California, and one made by the District Court in Delaware, all properly authenticated, and I will ask that these be marked in evidence and [6] introduce them for the information of the Court.

The Court: Very well.

(The documents were marked as Nealon's Exhibits 1 and 2 in evidence.)

Mr. Nealon: I might say, if your Honor please, that I expect to call two witnesses and introduce two depositions which have been taken. In order to save the time of all parties thereto, I have submitted the hypothetical question to the witnessses here in writing beforehand.

THOMAS W. NEALON,

the petitioner in this action, being first duly eworn, testified as follows:

Mr. Nealon: My name is Thomas W. Nealon. I am one of the solicitors for the plaintiffs in the class suit in Cause No. E-268-Phoenix, in the District Court of the United States for the District of Arizona, the first class suit in which Guadalupe R. Gallegos, Francisca Gallegos, his wife, Inga G. Gudmundsen, and Mata E. Dexter, in their own and in behalf of other similarly situated, plaintiffs, and the Intermountain Building and Loan Association, a corporation, was defendant, and that suit was brought by said named plaintiffs in their own behalf and in behalf of all others similarly situated. **[7]**

Since 1914, I have been, and am now a member of the Bar of the Supreme Court of the State of Arizona, and of the United States District Court in and for the Federal District of Arizona, and at all times since that date have been in active practice before the State Courts of Arizona and the Federal Courts in the District of Arizona; that I am now, and have been for many years, an active member of the State Bar of California and of the United States Court of Appeals for the Ninth Circuit, and during all of said period a large portion of my practice has been upon the equity side of the Federal Court.

Some months prior to April 18th, 1933, I was employed by certain lien-holding creditors of the Intermountain Building & Loan Association, a Utah

(Testimony of Thomas W. Nealon.)

corporation, to file suit against said corporation and establish equitable liens by court decree to recover trust property from the delinquent corporation and procure the appointment of a Receiver to preserve and conserve the assets of said corporation then being wasted and dissipated by the said corporation, its officers and directors.

The plaintiffs named in the said suit were among the lien-holding creditors who employed me to institute said suit, and said suit was filed on [8] April 13th—no, April 18th, 1933, inbehalf of such creditors and all others similarly situated, all parties so situated being too numerous to be made parties to the suit. The bill of complaint contained the following paragraph:

"That the plaintiffs bring this action on behalf of themselves and for all others similarly situated who desire to come in and bear their proportion of the expenses of this suit; that the persons so situated are too numerous to be made parties to this action."

Imediately upon being employed as aforesaid, I began an investigation of the affairs of said corporation, searching all available sources of information to ascertain the financial condition of said corporation, the nature and extent of its assets and liabilities, the conduct of its officers and directors, as well as a study of the law applicable to the exising situation.

In the course of this investigation, I discovered the following: 1. That the business of the defendant corporation, the Intermountain Building &

(Testimony of Thomas W. Nealon.)

Loan Association, a Utah corporation, was being conducted in a manner that would ultimately result in the waste and dissipation of all of the assets of the corporation, and that the corporation [9] had been insolvent from about the year 1922, if not before that date, and that it was not a true building and loan association, but a fraudulent corporation; that some 3,840 persons were creditors of that association at that time; that the bulk of these creditors were people of limited means, among them widows, orphans, guardians and old people, endeavoring to safely invest $5.50 per month and thus in the course of ten and one-half years accumulate One Thousand Dollars; that they possessed but limited business experience, which was not sufficient to enable them to analyze the complicated corporate structure of the defendant corporation, and they were influenced in making their investments by plausible propaganda presented by the corporation through newspaper articles, circulars and printed matter, as well as by high-pressure salesmen. That in the contract itself it was specifically provided that the corporation should hold in trust for each of the plaintiffs, and those similarly situated, real estate mortgages in the sum of one hundred per cent of the amount due to each of them, and that these securities in the trust fund shrould be subject to the constant inspection of the banking officials of Utah, or of the state in which the [10] creditor resided.

The contract contained the following provision:

(Testimony of Thomas W. Nealon.)

"Security. As security for the performance of the obligations of the Association hereunder, the Association will hold intact, subject to the constant examination and inspection of the Banking Department of the State of Utah, first mortgages on improved real estate in an amount equal to at least one hundred per cent of its liabilities hereunder, less the amount of any loans made on this and like certificates, or any certificates issued in lieu thereof."

Some of the securities issued by the corporation had that they were subject to the inspection of the Banking Commissioner, or similar official of any other state in which the corporation did business.

The investigation I made disclosed many wrongful acts committed by the Intermountain Building & Loan Association, resulting in the waste and dissipation of its assets and of the trust funds intrusted to it, and which caused the insolvency of the defendant corporation, some of which were as follows:

During a period of three and one-half years [11] there had been unlawfully paid to one M. E. Waddoups as commissions on the sale of securities of the said corporation, in many instances he receiving all that was paid into the corporation by the lender, the sum of $482,886.00; that dividends had been paid to said Waddoups and his associates that were never earned by the corporation, and which were wrongfully paid from the trust fund belong-

(Testimony of Thomas W. Nealon.)

ing to the plaintiffs, and others simliarly situated, amounting to the sum of $418,649.50.

That loans had been improvidently made, a large percentage of which were made in violation of the Articles of Incorporation and By-Laws of the Association, resulting in the loss of $765,182.78, a total loss of these three items alone of $1,666,718.28. That an exorbitant and fictitious salary, the amount being impossible to estimate, was paid to said Waddoups as President of said corporation, and had been during a long period of time, and upon a basis of $24,000.00 per year, approximately forty-five per cent of which came from the trust fund belonging to the plaintiffs, and those similarly situated, and which were paid in violation of the Articles of Incorporation and By-Laws of the Association while said Waddoups devoted only a part of his time to the [12] business of the Intermountain Building & Loan Association. That said Waddoups dominated and controlled the said corporation absolutely from the time of its organization in Utah in 1921, until his stock therein was purchased by one Daniel Alexander in, to-wit: October, 1924, and that upon losing control of said corporation he moved from Salt Lake City, Utah, to Phoenix, Arizona, where he organized the First National Building & Loan Association, and through said latter corporation obtained control of the defendant corporation in, to-wit: August of 1930; that at all times subsequent to that date up to the time of the appointment of he Receiver herein

(Testimony of Thomas W. Nealon.)

by the United States District Court, he retained such control and manipulated its affairs for the benefit of himself and to the injury of the plaintiffs, and those similarly situated.

That said Waddoups used the funds of the Association to finance the operations of the Lincoln Mortgage Company, a company largely owned and absolutely dominated by him, and the defendant corporation suffered extreme losses through the manipulations of loans made upon buildings erected by said Lincoln Mortgage Company.

That prior to the organization of the defendant [13] corporation, said Waddoups had entered into a secret contract with one Daniel Alexander, in which it was agreed that said Alexander should be elected President of the defendant corporation, that Waddoups should not be an officer, but should receive a large commission upon all contracts issued by the corporation of similar tenor to those held by the plaintiffs, and that they were to divide these profits derived from this transaction; that Alexander had sued Waddoups for his portion under such agreement, and that Wadoups had settled said suit before it came to trial; that some of these commissions ranged as high as seven per cent upon securities: that losses of an extremely large amount, the actual figures of which cannot be obtained, were suffered by the corporation through the negligence of its officers and directors in permitting taxes to acumulate on property on which they held mortgages, some for as

(Testimony of Thomas W. Nealon.)

long as a period of ten years, and in some cases the amount of the delinquent taxes amounted to more than the value of the property. As a result of this negligence, many properties were lost through tax sales, and other properties necessarily had to be abandoned. Nor did these officers and directors of the corporation take[14] any steps in court necessary to secure the payment of such taxes from the rental value of the property.

That in the year 1931 alone, unlawful dividends paid to the President of the Association, and his associates, amounted to some $119,312.68; that during the same period, the expenses, salaries, costs of collection, and other items ran the expense up to $218,718.79, a sum greater than could have been collected from the interest of all the mortgages held by the corporation, and the rents from all the properties owned by the corporation. That the losses of the corporation during that period alone were probably in excess of $240,000.00.

That the Association had paid large sums of money to withdrawing certificate-holders while it was insolvent, with the result that some of such holders had been paid in full while the plaintiffs and those similarly situated would receive, under any circumstances, only a portion of the money due them.

That the Association had, and was continuing to transfer many of its assets to other corporations; that the Association was not functioning for the purposes for which it was incorporated,

(Testimony of Thomas W. Nealon.)

that it was doing practically no new business or [15] any profitable business, and that it had lost the confidence of the public to such an extent that it could never be profitably conducted, and had lost all right to do any new business in Arizona.

My investigation further disclosed that the conduct of the officers and directors of the defendant corporation had been such that at the time your petitioner filed suit herein, the liabilities of the corporation exceeded the assets of said corporation by more than $700,000.00, and that the corporation was hopelessly insolvent and had been so since 1922; that its paid-in capital never exceeded $3,460.00, and this capital was exhausted before 1922, and from that time on it traveled on money borrowed from these creditors.

That the true state of affairs of the corporation was concealed from the creditors and the public by the fact that the total liabilities upon obligations like those held by the plaintiffs, and those similarly situated, never appeared upon the books of the corporation, and further by the fact that thousands of these obligations had been written off on the records of the corporation as if they had been forfeited, there being no authority of law whatsoever upon the part of the corporation and its officers so to do. As a result [16] thereof, there were hundreds of the creditors of said corporation who were entitled to participate in this trust fund whose rights had been totally lost. A large portion of the funds so forfeited was absorbed by said

(Testimony of Thomas W. Nealon.)

Waddoups and his associates through a particular form of stock called "Expense Fund Stock", although said funds belonged in a trust fund for the purpose of protecting those who had furnished money to buy the securities.

My investigation further disclosed that the officers and the directors of the corporation spent large sums of money out of the State for the purpose of giving a preference to residents of other states in the matter of the payment of claims similar to those of the plaintiffs herein, and those similarly situated; that among these sums so taken, $40,000.00 was sent to California in 1929, and $50,000.0 in 1932, which sums were invested in securities that are now held in California, and that there was a similar attempt to give a preference to residents of Oregon and Wyoming, all in violation of the rights conferred upon the plaintiffs and those similarly situated.

Mr. Morgan: May I interrupt or suggest, Mr. Nealon? If the Court, pleases, Mr. Nealon is reading the petition which, of course, sets out [17] the facts, and with the purpose, I presume, of having the petition included, or the evidence included in the record. That petition is, in all respects, similar to the petition that has been filed, or practically in all respects similar to the petition that has been filed by Mrs. Monaghan, with the exception that she asks for one fee for both counsel, and now I understand that all of the at-

(Testimony of Thomas W. Nealon.)

torneys—at least, all of Mrs. Monaghan's attorneys have been furnished with copies of this petition or have read the same, verified petitions are now before the Court, and I wonder if it could not be considered that the petition or both petitions have been read into the record and made a part of the record? The Court, of course, will read the petition, I presume. If it would not serve the purpose if the petition were summarized. I say that in the interest of expediency.

Mr. Nealon: Mr. Morgan is mistaken, I am not reading from the petition. I am reading from the hypothetical question, copies of which I have furnished to those who have made—those whose depositions have been taken and to witnesses I have called. They are different in respects. They are more complete, though I think come more closely to following the evidence. I will state [18] I do expect to offer it at the end of this petition that I filed as evidence after I swear to its truth, so that that will be in the record also, but I think it is necessary, if your Honor please, that I testify——

The Court: (Interrupting) Do you have that all written up?

The Witness: I have it all written up.

The Court: Why don't you introduce that? I will have to read it again, it seems to me.

The Witness: Will you consider it as read?

The Court: Yes, surely, save time.

(Testimony of Thomas W. Nealon.)

The Witness: All right, then. At this time, then, if your Honor please, I will offer in evidence the petition of Thomas W. Nealon filed in this case, and ask that it be marked as an exhibit.

The Court: All right, it may be admitted.

(The document was admitted as Petitioner Nealon's Exhibit No. 3 in evidence.)

[Printer's Note: Petitioner Nealon's Exhibit No. 3 is set out on pages 108-164 of this printed record.]

Mr. Nealon: Well, at this time, then, I will introduce into evidence the deposition of Judge Samuel L. Pattee, which contains, and I so testify, the identical questions from which I have testified, contains absolutely that matter, and then I will read to you on the stand the questions and [19] answers of Judge Pattee. I will testify also that I have every reason to believe that neither Judge Pattee nor William H. Burgess are now present in town so as to make this available——

The Court: (Interrupting) Now, what are you going to read?

The Witness: Just the questions and answers. They will be quite short.

The Court: Well, all right.

The Witness: I will offer next the petition of William H. Burgess—I mean the deposition. I will read the questions and answers.

The Court: All right.

(Testimony of Thomas W. Nealon.)

The Witness: I will leave out the formal parts because your Honor will have that before you.

(Thereupon the deposition of William H. Burgess was read by the witness, after which it was offered in evidence and received as Petitioner Nealon's Exhibit No. 4 in evidence.)

[Printer's Note: Petitioner Nealon's Exhibit No. 4 is set out at pages 164-216 of this printed record.]

The Witness: Now, I offer the testimony of Judge Samuel Pattee. Do you want me to read the questions and answers on that?

The Court: I don't think it will be necessary. I will have to read it again.

The Witness: I might state he fixes this fee at $100,000.00. He says, in his opinion, ten per [20] cent would be reasonable, but he is fixing at that sum.

(The deposition of Judge Samuel L. Pattee was received in evidence as Petitioner Nealon's Exhibit No. 5 in evidence.)

[Printer's Note: Petitioner Nealon's Exhibit No. 5 is set out at pages 216-221 of this printed record.]

The Witness: Now, I might add a little bit to the testimony in my application; that is, I have paid out all of the sums alleged in there as having been paid by me, and there was one mistake in the amount. I got a rebate of eighty-two cents, and I omitted an amount of five dollars that I paid

(Testimony of Thomas W. Nealon.)

for the getting of the opinion, but I have not changed the amount. I have here paid bills and checks on this case covering that fund with certain data, such as telegrams that are connected with it. I offer those into evidence as one exhibit, if your Honor please. You may examine it at your leisure.

(The documents were received as Petitioner Nealon's Exhibit No. 6 in evidence.)

PETITIONER NEALON'S EXHIBIT No. 6

No. 2388

Phoenix, Ariz., March 20, 1933

Pay to the Order of Brady & Acheson $20.00
.....Twenty and no/100..... Dollars

To The Phoenix National Bank,
91-3 12 Los A Phoenix, Ariz. THOMAS W. NEALON

[Stamped on reverse side with illegible bank stamps.]

To Brady & Acheson Dr.
Attorneys at Law
Suite 206 Kearns Building
Salt Lake City Utah

Mrs. E. G. Monaghan
Attorney at law
Prescott, Arizona

March 15, 1933

To Professional Services Rendered:
Services in re Intermountain Building and Loan Association to date.....$20.00
Paid

No. 2391

Phoenix, Ariz., March 22 1933

Pay to the Order of Brady & Acheson $5.00
.....Five and no/100..... Dollars

To The Phoenix National Bank,
91-3 12 Los A Phoenix, Ariz. THOMAS W NEALON

[Stamped on reverse side with illegible bank stamps.]

To Brady & Acheson Dr.
Attorneys at Law
Suite 206 Kearns Building
Salt Lake City, Utah

Mrs. E. G. Monaghan
Phoenix, Arizona

March 21, 1933

To Professional Services Rendered:

Services in obtaining building and loan report $5.00

Marshall
Services

No. 2439
Phoenix, Ariz. April 25, 1933

Pay to the Order of Elizabeth G. Monaghan $12.00
.....Twelve and no/100..... Dollars

To The Phoenix National Bank,
91-3 12 Los A Phoenix, Ariz. THOMAS W. NEALON

[Stamped on face: Cashed 15 (Illegible)].

[Endorsed on reverse side: Pay to Helen Erickson—E. G. Monaghan. Helen Erickson.]

Form No. 23

April 24, 1933

United States of America
.....District of Arizona—ss.
Elizabeth G. Monaghan
Phoenix, Arizona

To The United States, Dr.
For Services of the United States Marshal in the Case of
Gallegos et al. vs. Intermountain Bldg. & Loan Assn.

Marshal's Civil Docket No.	Date or Writ 1933	Nature of Fees and Expenses Charged	Marshal's Fees and Expenses
2778	April 18	Service of subpoena ad respondendum	$2.00
	"	Service of temporary restraining order	2.00
	"	Service of 4 subpoenae duces tecum at $2.00	8.00
			$12.00

Please remit.

[Stamped: Received payment. Dist. of Arizona, Apr 26 1933. J. M. Scanlon, Chief Deputy U. S. Marshal.]

No. 2394

Phoenix, Ariz. March 23, 1933

Pay to the Order of Mrs. S. A. Nelligan $5.00
.....Five and no/100..... Dollars

To The Phoenix National Bank,
91-3 12 Los A Phoenix, Arz. THOMAS W. NEALON

[Stamped on face: NT]
[Endorsed on reverse side: Mrs. S. A. Nelligan, and stamped with bank stamps.]

No.....

Phoenix, Ariz., April 1, 1933

Pay to the Order of Mrs. S. A. Nelligan $12.00
Twelve and no/100..... Dollars

To The Phoenix National Bank,
91-3 12 Los A Phoenix, Ariz. THOMAS W. NEALON,

[Stamped on face: NP. 11-8; N.P. 31-10]
[Endorsed on reverse side: Mrs. S. A. Nelligan; C. L. Stack, Agent, and stamped with bank stamps.]

Nelligan clerical work 17.00

Cert. Copy
Articles of Incorp.
Intermtn. Bldg. &
Loan Assn. Utah

No. 2437

Phoenix, Ariz. April 22, 1933

Pay to the Order of Arizona Corporation Commission
Nine and no/100..... $9.00 Dollars

To The Phoenix National Bank,
91-3 12 Los A Phoenix, Ariz.

THOMAS W. NEALON

[Stamped on reverse side with bank stamps.]

Office of the
Arizona Corporation Commission

Utah
Thomas W. Nealon

No. 51206
Phoenix, April 22, 1933

To the State of Arizona, Dr.

To Filing: In re: Intermountain Bldg. & Loan Ass'n.

Official Receipt

Articles of Incorporation.....Company
Amendment to Articles of Incorporation.....Company

Appointment of Agent	Company	
For Certified Copy of Articles to Incorporation √	Company	9.00
For Certified Copy of Amendment	Company	
For Issuing Certificate of Incorporation	Company	
For Issuing Foreign License	Company	
For Issuing Certificate of Filing Compliance	Company	
Annual Registration and Report Fees	Company	
Miscellaneous	Company	

Check # 2437

Received Payment, $9.00

ARIZONA CORPORATION COMMISSION

By PEARL SLAWSON
Clerk

All fees go to the State and must be paid in advance.

No. 2453

Cert. copy mtge.

Phoenix, Ariz., May 2, 1933

Pay to the Order of County Recorder of Maricopa County $3.35
.....Three and 35/100..... Dollars

To The Phoenix National Bank,
91-3 12 Los A Phoenix, Ariz.

THOMAS W. NEALON

[Stamped on reverse side with bank stamps.]

Recorder's Office,
Maricopa County, Arizona

Phoenix, Arizona, May 2, 1933

Thomas W. Nealon
To W. H. Linville, Recorder, Dr.
To Recording Instrument as follows:

All fees are required by law to be paid strictly in advance before instruments are placed on record.

Instrument	Grantor	Grantee	Fees
Cert. Copy Mtg.	Vaughn Higgins et ux.	Intermountain Bldg. & Loan Assn.	3.35

[Stamped: Paid. W. H. Linville, County Recorder.]

No.....

Phoenix, Ariz. May 14, 1933

Pay to the Order of S. A. Nelligan $25.75
.....Twenty Five and 75/100..... Dollars

To The Phoenix National Bank,
91-3 12 Los A Phoenix, Ariz. THOMAS W. NEALON

[Stamped on face: NT]

[Endorsed on reverse side: S. A. Nelligan; and stamped with illegible bank stamps.]

[Endorsed] Filed Dec. 20, 1937.

(Testimony of Thomas W. Nealon.)

The Witness: Now, these services rendered to these clients include not only services in this Court, but in the State courts, proceedings there which, in my opinion, saved the fund from being transferred out of the State so this Court could never obtain jurisdiction. I have here a certified copy of the proceedings, together with a [21] letter from one of their clients, authorizing me to institute the suit. I will offer that in evidence, if your Honor please.

(The document was received as Petitioner Nealon's Exhibit No. 7 in evidence.)

The Witness: Now, my total expenses for the period of three and one-half years during which I was in the—handled this case, was some Thirteen Thousand, Seven Hundred and Fifty odd Dollars. Five Thousand, Four Hundred of that, approximately that amount was paid to Mrs. Monaghan. She had been in my employ from a period early in 1933, to the 17th day of April, 1934, just prior to the time when the decision was handed down, which I think was April 20th. That is the period in the general expenses. There is no allowance asked for that at all. I am showing the amount of the work and the risks I took in the premises. All that was paid, $3,000.00 in Liberty Bonds, not Liberty Bonds, but Home Owners' Loan Bonds. The balance was paid by means of paying her expenses, Hotel Adams and Jefferson, and bought meals during the period she was with me there.

(Testimony of Thomas W. Nealon.)

Now, I, of course, cannot testify as to all the services that Mrs. Monaghan rendered, but she [22] did render quite valuable services, some of the most valuable part of which I don't think are included in her petition. She carried on practically all the correspondence with the plaintiffs in the cases. She made many of the investigations. One very important thing that she did in that connection was in ascertaining the citizenship of Ida May Roton, who was one of all the people to assign their claim in the first instance, and Inga G. Gudmundsen, one of the plaintiffs in here. Inga Gudmundsen was the only one that had claimed more than $3,000.00. Had Mrs. or Miss Roton, I don't know which it is, not been a citizen of Arizona, we would not have had a jurisdictional amount; that is, could not otherwise be a party.

She did a great deal in the way of investigations of facts shown in the various suits in the State Courts, carried on practically all correspondence, and brought many of the parties into my office, and procured affidavits, and made examination of records and made an affidavit that was used in the proper cause showing the insolvency. All of this necessarily helped a great deal, but she can testify to that much more than I can.

She was present also at the hearing at San Francisco, though she did not participate in the [23] argument. She also did a good deal of research work, the amount of which I could not estimate.

[Testimony of Thomas W. Nealon.)

I might say in regard to these expenses, there are two items there which I have not receipts. One was on my expenses on the trip to San Francisco. I charged in that the actual hotel and five dollars a day for expenses. There are five days, I think it calls for. I also have charged in there for the time of my secretary while she was engaged on the briefs alone, not the general work, but on the briefs alone, and charged that on the basis of $35 a week. At first she was only getting $25 a week, but I made an allowance afterwards that made it $35. I charged that on expenses paid out. If I should forget anything—should I have forgotten anything, I hope your Honor will ask me and I will supply it.

The Court: All right.

Mr. Morgan: Mr. Nealon, before you get off the stand, and in order to get it on the record, when Mr. Pattee fixed the fee of $100,000.00, was that one-half of a reasonable fee?

The Witness: I think that is the way he intended. Ten per cent was a reasonable fee for the whole thing.

Mr. Morgan: Sir? [24]

The Witness: Ten per cent would be a reasonable fee.

Mr. Morgan: Based on Two Million Dollars?

The Witness: Yes.

Mr. Morgan: That is all. Thank you.

The Witness: The hypothetical question, he

(Testimony of Thomas W. Nealon.)
states that any trust fund recovered in excess of Two Million Dollars.

(The witness was excused.)

Mr. Nealon: Will Mr. Dougherty take the stand, please?

M. J. DOUGHERTY

was called as a witness on behalf of Petitioner Nealon, and being first duly sworn, testified as follows:

Direct Examination

Mr. Nealon:

Q. State your name to the Court, please.

A. M. J. Dougherty.

Q. And you have been a resident of Maricopa County how long, Mr. Dougherty?

A. Twenty-eight years.

Q. And have been a member of the Bar of this Court for how long?

A. Twenty-eight years. [25]

Q. You have been in active practice all of that time?

A. Except during the past year of my illness, yes.

Q. And you are a member of the Bar of the Ninth Circuit Court of Appeals? A. Yes.

Q. And the Supreme Court of the United States? A. Yes.

Q. You have handled litigation in which the

(Testimony of M. J. Dougherty.)

amounts in volved were in excess of a Million Dollars? A. Yes.

Q. Was some of that litigation in the nature of class suits, or involved the same kind of issues?

A. Yes, they were. They involved a great many questions with a great many persons, and to some extent they involved classes.

Q. Was that litigation conducted in this Court, Mr. Dougherty?

A. One of them was, one suit.

Q. You are familiar with the fees usually charged by attorneys in Arizona?

A. Yes, I believe I am.

Q. You have read the hypothetical question that has been incorporated into the record here, [26] have you not? A. Yes, I have.

Q. And how long have you known the Petitioner Nealon?

A. For something over twenty-five years.

Q. And state to the Court your opinion of his standing as a lawyer, and so forth.

A. Well, I have always regarded Mr. Nealon as an attorney of exceptional qualifications, a man who—an attorney who would give very close attention to any business which he handled; very faithful to the interests of his clients, and a very industrious practitioner; a man of unquestionable standing and honesty; has a very high regard by the members of the Bar, and by the citizens of the County, as indicated by his practice.

(Testimony of M. J. Dougherty.)

Q. You have been associated with me in cases, and have been against me in cases, have you not?

A. Yes, both ways, parts of the way, sometimes on one side, sometimes on the other.

Q. Now, in answer to the hypothetical question which has been submitted to you, state what, in your opinion, would be a proper fee in the premises?

A. I think that ten per cent of the amount [27] recovered would be a reasonable fee.

Q. Now, will you state your reasons for that opinion, please?

A. Yes. I have always regarded the nature of the litigation involved, the complexity of the legal questions; the risks involved, and the time element all enters very materially into the consideration of the fee. In cases of this kind I, after reading over that explanation of the work done, it cannot help but impress anyone who reads it the length of time required to prosecute the litigation to an approaching end. A great number of interviews and conferences that it must have involved, and the exceptional amount of time required.

I am more or less familiar with the litigation independent of this question that has been submitted to me. I have a number of clients who have held obligations to that company. None of them held enough to warrant a separate procedure. Any one of them would have been very fortunate if they could have induced any attorney to handle their matter for ten per cent of the amount involved, and they were unable to do so because no attorney would

(Testimony of M. J. Dougherty.)

take it for ten per cent, but they would be very fortunate if they could have gotten [28] it for ten percent. I think, as a matter of fact, they would be fortunate if it could be handled; in fact, no less fortunately as an aggregation.

The complexity of the questions involved is really astounding. It involves not only questions arising in the field of law, but in accounting and corporate practices, statutory constructions, that you need only be an attorney with the knowledge of corporation procedure which would follow the ramifications which this Company took in its business, and only one with a fairly comprehensive knowledge of accounting would be able to piece the transactions together to make it a complete picture.

In all fields of human endeavor, as far as I know, the risk very materially determines the charge for services, whether it be by interest or in any other way. Of course, a case of this kind involves a great risk.

We often take cases which we have to carry through for probably two or three years, with the possibility that the entire time will be lost if the case is unsuccessful, and I think that is the case here, that the risk involved materially entered into the consideration. A case of this kind, when it comes into an office, it occupies [29] the attention of an attorney not only when he is actually working on it, but he has the case on his mind as long as it stays in the office, and it is substantially true to say it remains on his mind as a part of his active thoughts during all the time it remains uncom-

(Testimony of M. J. Dougherty.)

pleted in his office. Only professional men who have had experience with cases of this kind realize the amount of time an attorney puts upon the case outside of his office, and outside interviews and conferences. It seems to me that it required professional services, professional skill, I'd say, of the very highest order to have followed this case as closely as was necessary to bring it to a conclusion. In the first place, there were fundamental questions involved there that would decide the success or failure of the case in the beginning, not to mention anything about procedural questions or questions on adjective law. Upon the whole, on reading that through, I would regard it as an exceptional case, and one that is very creditable to Mr. Nealon and whoever was associated with him in the case. I am sure that nothing more could have been honored for those involved than what the final judgment in this case will include. When I say ten per cent, it [30] is not a stereotyped expression. I say if any one of those clients had come to any lawyer in Maricopa County and said, "Will you handle my matter for ten per cent?", they would be disappointed because no lawyer in this State would have taken that account for ten per cent and do it. Now, when he gets the same result in the aggregate, there isn't any reason that I can see why he should not be paid ten per cent, and that would be a very moderate fee.

Mr. Nealon: Does the Court wish to ask any questions?

The Court: No.

(Testimony of M. J. Dougherty.)

Mr. Nealon: Thank you, Mr. Dougherty.

(The witness was excused.)

Mr. Nealon: Judge Jenckes, take the stand, please.

JOSEPH S. *JENKES,*

a witness on behalf of Petitioner Nealon, was duly sworn, and testified as follows:

Direct Examination

Mr. Nealon:

Q. State your name, please.

A. Joseph S. Jenckes.

Q. You are resident of Maricopa County for [31] how long, Judge Jenckes?

A. Thirty years.

Q. You were former Judge of the Superior Court of the State of Arizona and the County of Maricopa, were you not? A. I was.

Q. How long did you serve in that capacity, please? A. Ten years.

Q. And in that capacity did you have the handling of many equity cases, including receiverships, and so forth?

A. Well, some. I wouldn't say many, but some.

Q. You have handled many equity cases?

A. Well, I guess there were equity cases. It is hard to distinguish what are equity cases in the Superior Court.

Q. You are a member of this Court and the Bar of this Court for how long?

(Testimony of Joseph S. Jenckes.)

A. Twenty-five years.

Q. And have been a member of the Bar of the Ninth Circuit Court of Appeals approximately the same time?

A. Well, 1917, I think was the first case I handled and went there on.

Q. You had some knowledge of this case and of [32] the Waddoups group of Building & Loan Associations while you were upon the Superior Court bench?

A. Yes, I first learned of this Building & Loan Association, so-called, I think in 1931.

Q. So that you have a knowledge in regard to these cases outside of that incorporated into the hypothetical question? A. Yes.

Q. That question has been submitted to you and you have read it? A. Yes.

Q. How long have you known the Petitioner Nealon?

A. Well, I think it has been about twenty years, might have been twenty-two. Ever since you came here, as I recall.

Q. For your information, I came in 1914. I have practiced in your Court? A. Yes.

Q. We have been associated together in some cases and opposed in some cases? A. Yes.

Q. Will you state your opinion to the Court as to my standing as a lawyer, and so forth?

A. Why, I think the standing of Mr. Nealon as a lawyer in this community is of the highest, both

(Testimony of Joseph S. Jenckes.)

[33] as to his character and as to his ability as a lawyer.

Q. In the submitting of the hypothetical question to you, will you please answer as to what fees you would deem reasonable in the premises for the services rendered?

A. Yes. The hypothetical question directed my attention particularly to the services rendered by Mr. Nealon, but I gathered from reading the question that those services were rendered by him in conjunction with his associate, Mrs. Monaghan, and I have considered the whole proposition as a joint proposition; that is, services rendered by counsel for the plaintiffs in this case, and I believe, I find —I heard Mr. Nealon state a short time ago that he was asking for compensation for himself of one-half of that, so I base—it would be hard, it would be difficult to segregate the services rendered by Mr. Nealon from those rendered jointly by himself and Mrs. Monaghan, so I will consider the proposition as a joint proposition first and say that I believe a fee of ten per cent of the amount recovered, which is upwards of Two Million Dollars, would be a very reasonable fee for counsel for the plaintiffs, and as Mr. Nealon is asking for half of the fee of counsel [34] for the plaintiffs, I'd say that my answer to the typothetical questions would be that $100,000.00 would be reasonable.

Q. Now, will you state the reason for your opinion in fixing that valuation, please?

A. Well, a case of that kind, if you will read

(Testimony of Joseph S. Jenckes.)

this hypothetical question, and if you know something of these so-called building and loan associations and what has happened to them in the past few years, one would regard an action of this kind largely as a salvage proposition, that it is a good deal like salvaging a wreck at sea. It is a wreck, and it is gone unless somebody interests themselves enough in it to go after it and try to recover some of it, and this particular wreck, it appears, was in the situation, or it was until Mr. Nealon and Mrs. Monaghan got into the picture. It is like the situation that exists with the Lusitania. It is at the bottom of the ocean, and in order to salvage it, you have got to expend a lot of energy. Mr. Nealon and Mrs. Monaghan have expended that time and energy and raised this wreck to the surface, and succeeded in recovering for those creditors Two Million Dollars which, otherwise, they would not have had, and I believe that if they had contacted the whole bunch of [35] creditors and made a contract with them in the beginning, they would have been justified in charging them fifty per cent at least for salvaging whatever they could, and that certainly ten per cent is a very, very modest fee for what they have accomplished. The time and energy expended upon it is all contained in the hypothetical question. If they had not recovered, their services would have been entirely lost to themselves, three years of labor for nothing, and that, of course, is always taken into consideration in questions of this kind, labor expended of 586 days

(Testimony of Joseph S. Jenckes.)

in court, I believe that is what is stated in the hypothetical question.

Q. In the preparation of briefs.

A. Preparation of briefs and attendance in court, that in itself, if paid for without the risk of being lost because of any contingency, in itself would be worth a hundred dollars a day, or $558,-600.00.

Q. I think you have got your figures too high as to the days.

A. Well, I haven't, Judge, in the hypothetical question——

Q. (Interrupting) I think you are right. I didn't realize that. [36] A. Yes.

Q. That was court days, 500 days.

A. Yes. I don't have any hesitation at all in saying that I am well satisfied that the services rendered in this case was worth ten per cent, and Mr. Nealon's services, if he says he has to have half, I would say his services were well worth a hundred thousand dollars.

Mr. Nealon: Does the Court care to ask any questions?

The Court: No.

(The witness was excused.)

Mr. Nealon: I think that is all I want to put in. At the close of the case I want to offer a couple of motions for petitions.

The Court: All right.

Mr. Morgan: May the applicant proceed, your Honor, with the petition of Elizabeth G. Monaghan?

The Court: We will take a brief recess before you proceed.

(A short recess was taken, after which all parties, as noted by the Clerk's record, being present, the hearing resumed as follows:)

Mr. Morgan: May Mrs. Monaghan be sworn?

[37]

ELIZABETH G. MONAGHAN,

a witness in her own behalf, was duly sworn and testified as follows:

Direct Examination

Mr. Morgan:

Q. Your name for the record, please?

A. Elizabeth G. Monaghan.

Q. Where do you reside?

A. Prescott, Arizona.

Q. What is your profession?

A. Attorney.

Q. When were you first admitted?

A. In——

Q. (Interrupting) What year? A. 1923.

Q. Where were you admitted, in Arizona?

A. In Arizona, yes.

Q. Are you admitted in other states?

A. California.

Q. You are also admitted, of course, to practice in the Federal Courts?

(Testimony of Elizabeth G. Monaghan.)

A. I am admitted to practice in the Federal Courts of Arizona, and the Ninth Circuit Court.

Q. Prior to your admission to the Bar, did you have any legal experience?

A. Yes, I have been legal secretary and law clerk since 1912. [38]

Q. Continuously to 1923?

A. Continuously.

Q. Since the year 1923, were you connected in the general practice of law, and if so, where?

A. In Prescott and Phoenix.

Q. In a general way, what does your practice consist of?

A. Just general, Mr. Morgan; equity and law, probating contested wills; bankruptcy. I had some receivership experience.

Q. Have you had any—Prior to the institution of the present action, did you have any special experience on practice in connection with receivership proceedings.

A. Yes, I did, in connection with the Jerome-Portland receiverships. I think there were several cases in that group.

Q. Was that a class case?

A. That was a class suit. I think it involved something—well, it was a million, five or six hundred thousand dollars in that. I think it was recovered.

Q. After your admission to the Bar, you worked on this case?

A. I worked on this case while I was in your office.

(Testimony of Elizabeth G. Monaghan.)

Q. Did you have any special experience in [39] other receivership cases?

A. Well, yes, while I was assistant to Mr. Joseph H. Morgan in the Coburn Receivership in 1925 and 1926.

Q. Do you recall in what counties those receiverships were filed?

A. It was Yavapai, Graham, Gila—there was another one, Mohave.

Q. What was the total amount involved in this receivership?

A. Something like a million and a half.

Q. During the year 1932, were you employed by the creditors of the Intermountain Building & Loan Association?

A. I was, Mr. Morgan.

Q. Particularly the plaintiffs in this action?

A. Yes, and more directly by others prior to these plaintiffs, Mr. Morgan.

Q. During the year 1932, did you do any work in connection with the Intermountain——

A. (Interrupting) Oh, a great deal, in the early part of 1932.

Q. And during all of 1932, did you work on those matters?

A. All of 1932 and of 1933, practically all of 1934. [40]

Q. And approximately how many creditors?

A. Did I have personally?

Q. Had you employed?

A. I know the——

(Testimony of Elizabeth G. Monaghan.)

Q. (Interrupting) I don't mean in the present procedure, but I mean in connection with the——

A. (Interrupting) Oh, forty to fifty.

Q. Later on were you specially employed by the plaintiffs in this action?

A. Yes, I had been employed by them just in a general way.

Q. Written authority given to you to file the action? A. Yes, sir.

Q. I hand you three separate documents, one signed by Guadalupe Gallegos, another by Inga G. Gudmundsen, and one by Mata E. Dexter.

A. There was another one, Francisca Gallegos also.

Q. Are these the instruments that authorized you to bring in appropriate action?

A. Yes.

Mr. Morgan: We offer those in evidence, your Honor, as one exhibit.

(The documents were received as Petitioner Monaghan's Exhibit A in evidence.) [41]

Mr. Morgan: I will state for the purpose of the record, they authorize Mrs. Monaghan to institute action against the Intermountain Building & Loan Association, and also authorized her to employ associate counsel.

Q. Following the authorization by these particular plaintiffs, did you bring an action?

A. Yes, I did, April 19th, 1933.

(Testimony of Elizabeth G. Monaghan.)

Q. The record shows that you were the sole solicitor in that case?

A. Yes, but I'd like to explain that.

Q. You can make any explanation you see fit.

A. Those clients of mine, and many others that I had, I had discussed the matter with Mr. Nealon on numerous occasions. I asked him if he would join with me in these proceedings, and he said he would advise me and help me all he could, but he did not want to be an attorney in the matter. It later developed I just had to have someone for the court work, and I knew how good he was, and he joined me then some time subsequent to June, 1933.

Q. I believe the amended bill of complaint upon which that Receiver was finally appointed in this case was filed——

A. (Interrupting) June 23rd, 1933.

Q. At that time Mr. Nealon was not associated [42] in the case?

A. Not as attorney.

Q. As solicitor of record? A. No.

Q. Later on he did become associated in the record?

A. Yes, after I had to——

Q. (Interrupting) Mr. Nealon said something to the effect that you were employed by him in 1932. Was that employment in connection with this particular case?

A. Oh, no, it was some law and special work. I could have brought my letter I had. I think I have a

(Testimony of Elizabeth G. Monaghan.)

copy of it, just two or three days a week. I'd just come down on occasions.

Q. You were working on other cases for him?

A. Other cases, yes. This case was my own case. I brought this down with me when I came. It originated in Prescott.

Q. You have filed a petition in this case which I believe practically in all respects is similar to the petition which was filed by Mr. Nealon except you expect one fee to be allowed both for yourself and Mr. Nealon, is that right?

A. That is right.

Q. I believe you also include the statements [43] to the effect that you and Mr. Nealon employed Mr. James H. Smith, an accountant, to assist you in the work?

A. Yes, sir; it was necessary. We were not accountants, and the nature of this case absolutely precluded us from getting the information that we should have had in order to prove our case without a certified public accountant, and a good one at that.

Q. Did you verify the petition you have filed?

A. I have.

Q. You, at this time, swear to that petition as to the truth of the facts therein stated? A. I do.

Q. What, if any, arrangements did you have with Mr. Nealon at the time you associated with him in the case as to any fees you might recover?

A. The agreement was we would split fifty-fifty, he to do the work of briefing; that is, dictating of them. I realized he was much more familiar with it

(Testimony of Elizabeth G. Monaghan.)

than I was. As to the detail work, I did practically ninety per cent of it, which was all right. It was a joint venture. What we did, we did as a joint venture, what one did. The other didn't do anything without consulting with him, that we didn't go over pro and [44] con, go over it nights and days. There was nothing done that was not consulted and talked over, I with him and he with me.

Q. At the time you were employed in this case, did these clients pay you any fee?

A. No.

Q. Were any of them able to pay you any fee?

A. No, they were not, Mr. Morgan. Most of the clients were in moderate circumstances.

Q. Just briefly, will you state upon what general investigation you base your facts for the appointment of a Receiver, just briefly, now.

A. Well, I believe, really, Mr. Morgan, that it would better suit the purpose of the Court if you will just incorporate my petition, because I think I have set that out very clearly in here. Of course, the proceedings that went on, Mr. Nealon set that out, but in regard to the actual work and the investigation, it is just impossible to detail each little bit of work.

Q. What, if any, trips did you make ascertaining —in a general way what was the investigation you personally made prior to the institution of this action?

A. Oh, I checked every mortgage that these people had in Arizona and in Utah. I checked every [45] piece of property there. I went to Utah and exam-

(Testimony of Elizabeth G. Monaghan.)

ined all the records up there. We secured copies of their reports. My sister got them from Salt Lake. We checked them and we found that these reports, what we called them and what Mr. Smith advised us were "Cover-up Reports", they did not reflect the true situation of the Company. We found that Mr. Waddoups and the other members of the firm were being paid exorbitant salaries. We found dividends were being paid out of surplus and not profits.

Q. I believe that is all shown in your petition?

A. That is all shown in my petition.

Q. How much time did you actually put in on your investigation and your work in connection with this case?

A. Now, based on Mr. Nealon's statement of five hours a day as a legal day, I think I put in five hours a day actually covering two and a half years, nights, Sundays, holidays and days.

Q. That is to say, two and a half years continuous work?

A. Yes. Of course, there was a little time out that I went to Chicago on the National Convention that I didn't spend any time there, but I [46] was helping to elect our beloved President, so I think I will be excused.

Q. May I present these telegrams to you? Those are the telegrams to Mr. Nealon?

A. Those are telegrams from Mr. Nealon to me.

Q. Oh, telegrams from Mr. Nealon to you?

A. That was in reference to clients that I had

(Testimony of Elizabeth G. Monaghan.)

at the time I went to Chicago. I had been trying to get some settlement out of the Company, and couldn't get anything. I think Mr. Nealon has that set out on Page 11 of his brief.

Q. I notice in one of these wires he asked for authority to take some action?

A. Yes, I authorized him to bring suit that we spoke of here in order to protect the assets and keep them from going out of the State.

Q. When was the final decree entered in this case? A. In September, 1936.

Q. How many pages of pleadings, records, did you assist in preparing and file in Court?

A. Just a rough estimate in going through the files, I find there were approximately a thousand pages of legal work. That is just that originated out of our side.

Q. Did you, yourself, join in that work? [47]

A. Oh, yes, all of it, and a great many of the intermediate briefs, preliminary briefs I wrote myself without any assistance of the stenographer. I mean, I just typed them in my office.

Q. You worked up the law in your office?

A. Oh yes, we did together.

Q. Mr. Nealon appeared jointly in court?

A. Oh, yes, he did, did a lot of law work, but even his work, law cases that he looked up, it was discussed with me, law cases I looked up, every point in the proceedings.

Q. Have you the total pages of the briefs?

(Testimony of Elizabeth G. Monaghan.)

A. No, I haven't, that is just the pleadings. Briefs, I don't know, they were rather extensive. Mr. Nealon dictated all the briefs.

Q. How many pages that were filed by the Association did you have to review?

A. I checked it through their records, it was around 700 pages, exclusive of the briefs in the Circuit Court.

Q. Now, Mrs. Monaghan, for the services of yourself and Mr. Nealon, what do you state would be a reasonable fee, taking into consideration the fact your fee was to be paid on a contingent basis entirely?

A. Well, of course, I am not as well versed [48] on those matters as these gentlemen are, Mr. Morgan, but when you say that you would not take a case of, say, five or six hundred days for ten per cent, that is true. You know that when you get a big aggregate of cases, one always takes it for less than on the single collection, but my estimation of what was done, it is just absolutely impossible to tell the amount of work digging and plugging that we did, all of us, Mr. lon, Mr. Smith and myself. Well, I would hate to think the Court would allow us less than $150,000.00.

Q. Are you familiar with the allowance made in the Coburn case and the other cases?

A. Yes, I believe, if I remember, Mr. Morgan, in that Coburn Receivership that we handled, there was recovered, well, the assets, I think, totaled around a million and a half. There was only about half of that recovered, and a fee of $50,000.00 was allowed, and

(Testimony of Elizabeth G. Monaghan.)

about Twenty-five Thousand in the Jerome-Portland.

Q. Now, in your petition you speak about the employment of Mr. Smith? A. Yes.

Q. Briefly, state how that came, the employment came about.

A. Well—— [49]

Q. (Interrupting) What was done with Mr. Smith?

A. The nature of this suit, it was just as much accounting in the beginning as it was the law. Of course, it developed later into the law questions, but in the beginning we just had to have an expert accountant to get us started on the reports, to see how to break them down, to estimate the cost of money to the Association; to see whether they were making any money or not. Of course, I don't really understand a lot of accounting, but I know that we just had to have his services or we could not have gotten started, that is all.

Q. Do you know about how many days Mr. Smith put on this work? A. Oh, goodness.

Q. Approximately?

A. Oh, I don't know. I think he set up here days and days, 150—200 days.

Q. And how was he to be paid, Mr. Smith to be paid?

A. My agreement with Mr. Smith was after I talked the matter over with him, it was on a contingent basis. If we won out and a Receiver was appointed, we would petition the Court for a reasona-

(Testimony of Elizabeth G. Monaghan.)

ble fee. He took the chance; that is, if [50] we lost, he wouldn't get it.

Q. After Mr. Nealon was associated in the case with you, did he also confirm that agreement with Mr. Smith?

A. Oh, yes, most of the work was done, of course, the detail and the breaking down of the reports, that was done with Mr. Nealon's knowledge.

Q. You have had considerable knowledge——

A. (Interrupting) Yes, but not the type of accounting that was necessary in this case.

Q. From your own knowledge of what Mr. Smith has done, what would you say would be a reasonable fee for his services?

A. I think an estimate of $10,000.00 was a reasonable estimation, if I know the value of the work to us.

Q. What was the total amount, if you know, that was recovered and placed in the care and custody of the Court?

A. Well, according to the book record, it was Two Million, Seven Hundred and some odd thousand dollars, but they discounted for loss on realization about Six or Seven Hundred Thousand Dollars of that, so it was a little over Two Million Dollars. That is, the loss had not been taken yet, but they considered it would be lost. [51]

Q. Does your petition show the complications that arose out of this case by reason of the intervention of one Malia who was Superintendent of Banks in Utah?

(Testimony of Elizabeth G. Monaghan.)

A. Yes, that is set out very clearly in both my petition and Mr. Nealon's.

Q. Did that add much to your work?

A. Very much. Mr. Morgan, there wasn't one attorney in this State, including yourself and Mr. Gust, that said we had a leg to stand on. We just had to fight every inch of the way and fight——

Q. (Interrupting) In other words, this was an extremely hazardous case?

A. It certainly was, and everybody told us we were hanging by our eyebrows.

Q. I think you folks were told that by a half dozen lawyers?

A. Oh, by a half dozen firms in this town and in Utah.

Mr. Morgan: At this time we offer as a part of the records the verified petition of Mrs. Monaghan, which is filed in the record here, which details the facts——

The Court: All right.

Mr. Morgan: Your verified petition, or copies of that petition, has been presented to the [52] attorneys that you have called to testify?

A. Yes, sir.

Mr. Morgan: I believe that is all unless you have something further, unless the Court desires——

The Court: No questions.

(The witness was excused.)

(The document was received as Petitioner Monaghan's Exhibit B in evidence.)

[Printer's Note: Petitioner Monaghan's Exhibit B is set out on pages 43-108 of this printed record.]

Mr. Morgan: Mr. Gust. At this time while I think about it, if your Honor please, on behalf of the Petitioner, Elizabeth G. Monaghan, we adopt the testimony offered on behalf of the Petitioner Thomas Nealon, in so far as it is applicable to Mrs. Monaghan's petition, that one fee should be allowed, and for the purpose of showing the services of Mr. Nealon, as he has testified.

The Court: All right.

JOHN L. GUST

was called as a witness on behalf of the Petitioner Monaghan, and being first duly sworn, testified as follows:

Direct Examination

Mr. Morgan:

Q. Your name, please?

A. John L. Gust.

Q. Your profession? [53]

A. Lawyer.

Q. I believe you have practiced law in the State of Arizona? A. Since 1909.

Q. You are a resident of Phoenix?

A. Yes.

Q. You are also admitted, I take it, in the various United States Courts, and I believe in the United States Supreme Court? A. I am.

(Testimony of John L. Gust.)

Q. Your practice covers a very wide field?

A. Yes, it covers many different subjects.

Q. You have been involved in numerous receiverships, I presume?

A. Some, in various ways.

Q. In connection with your law practice, I presume you have considerable knowledge of what fees should be allowed attorneys in cases?

A. Well, I have knowledge of what fees they asked for and what fees they got.

Q. Is an attorney entitled to a greater fee when a case is taken on a contingent basis than where he is regularly retained?

A. Oh, undoubtedly.

Q. Why is that?

A. Because of the hazard he takes in getting [54] anything. If he takes a case on a contingent fee, why, he may recover a fee, and, of course, he may get nothing. Very often he gets nothing.

Q. How much more, in your opinion, should be charged for a fee collected by one who takes a case on a contingent fee and is successful, than one who would be regularly retained and paid in advance?

A. That would depend on the nature of the case. I think in ordinary cases I have observed that were taken on a contingent fee, I think it would be about three times the straight fee, but that does not apply in this case, in my opinion.

Q. Where the case is hazardous, the contingent

(Testimony of John L. Gust.)

fee is greater, and therefore the fee should be greater? A. It should, yes.

Q. Outside of what you have heard in Court and what you may have read in the petition in this case, do you know something about the hazards of this particular case, the legal questions involved?

A. Yes, quite a bit, because this case came to me several times as attorney for the Valley Bank, when the question was raised as to whether the Bank should recognize Malia and others with reference to handling of the funds—with reference [55] to removing funds, or the possible removing of funds out of this State, and at that time, while I advised the Bank to hold onto the money, I did come to the conclusion, and to Mrs. Monaghan, I said to her that the plaintiffs' chances were very slim.

Q. Have you read Mrs. Monaghan's verified petition detailing the work that was done by her and her associate? A. Yes.

Q. Now, assuming that Mr. Nealon's petition is practically the same as Mrs. Monaghan's, and also taking into consideration the testimony of Mr. Nealon on the stand, and Mrs. Monaghan, any knowledge that you may have of their ability; the fact that the work was all done on a contingent basis; this case was highly hazardous, that it involved litigation and work consuming approximately three and a half years time, also taking into consideration the court proceedings which have been testified to, the difficulties encountered, the ob-

(Testimony of John L. Gust.)

stacles interposed, including the intervention of the Bank Commissioner of Utah, Malia, which you have just mentioned, appeals to the Circuit Court of Appeals, and the United States Supreme Court, and the difficult questions [56] involved, and that as a result of these attorneys' efforts, the assets amounting to approximately Two Million Dollars have been impounded in Court for the benefit of all creditors of the Association, what, in your judgment, would be a reasonable fee for such services?

A. Mr. Morgan, I think you made an error there in your statement of your time. I believe, according to Mrs. Monaghan's testimony, and Mr. Nealon's too, it was about two and a half years actually involved.

Q. Well, it covered a period of three and a half years, but two and one-half years continuous work, 1932 to 1936?

A. Yes. Well, I listened to the testimony of the attorneys who testified for Mr. Nealon and also the depositions, and I reached the conclusion that $150,000.00 for the total fee of the two would be about right.

Q. Now, assuming that this petition of Mrs. Monaghan is to be considered separately from the petition of Mr. Nealon, what would you have to say as to the fee that should be allowed Mrs. Monaghan separately?

A. I don't believe I am able to separate those two fees. I think that work was so interwoven

(Testimony of John L. Gust.)

[57] that in my own mind I am not able to determine what should be allowed to one and separately, but I understood the testimony given here that that question was not involved.

Q. Now, explain, if you wish, any additional basis for your testimony that the fee should be about $150,000.00.

A. Well, I figured this over in several ways. I have looked up in other connections the fees that have been allowed by Courts of Equity, in the Federal Courts and also the State Courts somewhat. I find that the figure, the percentage that has been given here on the stand of ten per cent involving large amounts like this is quite generally taken as a sort of a basis. I figure that that would mean a fee of about $200,000.00 in this case for the total fee, which was the testimony, I believe, of Mr. Burgess, the deposition Mr. Nealon introduced in evidence here, but I went a step further and figured this, that if this fee was to be paid now before there is to be a final distribution of the funds in this case, that maybe the present inventory value might not be fully realized, and there might be some shrinkage in there, so I made a deduction there in arriving at the figure, because I think it would [58] be advisable to reach a definite figure, and I made some deduction there, and I reached the figure of $150,000.00. I don't think I could very well go below that. I notice these other lawyers testifying that they had been engaged in cases involving more than a million dollars, and I have—I'd have to say

(Testimony of John L. Gust.)

that I never did have a case like this involving that amount of money. I have never received a fee such as I am testifying to here myself in my own practice. I will say this, however, that my practice is pretty steady and consistent, and fairly sure of remuneration, and I have had the opportunity to engage in cases of this kind, and looked as slim as this, and I didn't take them because I didn't think I could afford to, because I figured I could not spend the time that was necessary, and take the chance to recover that fee. I guess I haven't enough of the gambling spirit to do that, but I figure this fee principally in this way:

Suppose you take Mr. Nealon and Mrs. Monaghan, both together, and putting in the time as Mr. Nealon testified here, two and a half years steady time on this proposition without any compensation. Certainly, on the basis of ordinary everyday law work, receiving their compensation not on a [59] contingency, but as a certainty, those two lawyers, their services should be worth Fifteen Thousand a year. I have had quite a little to do with just that kind of practice. I have some lawyers in my own employ. I know that there are other firms here that do, and I know something about what is supposed to be the proper compensation for a lawyer. While it is a fact that during this period of time involved here, a lawyer's compensation has not been so great, but still I will say that anybody can see that the combined services of those two people would be at least worth

(Testimony of John L. Gust.)

Fifteen Thousand a year. Now, if you will take that for two and a half years there, that makes $37,-500.00. That would be not on a contingency.

I testified here that I thought in the ordinary case the ordinary contingency fee, the contingent fee should be about three times the regular fee. I will say in this case it could not possibly be less than five, because this had many elements of uncertainty. The fact of the matter was, that they had no evidence to begin with. They had to go out and dig up this evidence, and that was a difficult job, and which I believe Mrs. Monaghan put in a great deal of time. [60]

They succeeded in getting that evidence and enough to convince the Court to make an appointment of a Receiver. About the time that was done Malia had come into the picture. The decisions at that time were such that one had every reason to believe that Malia would be permitted to administer this property in the way he was proposing to do. That was the reason I thought they had no chance, because of that proposition primarily.

They proved the negligence on the part of Malia, according to the decision of the Courts. In that they may have been lucky, or they may have been better lawyers than the rest of us, I don't know which it was, but in either event, I think if it was because of their greater ability, they are entitled to compensation, or because of their luck, they still are.

(Testimony of John L. Gust.)

I figure in this case the percentage should be no less than five times what a straight fee would be, and if you figure five times $37,000.00, you get close to the Two Hundred Thousand again, and then, as I say, on the matter of making some deduction again to be sure you are not making it too high, why, I get somewhere around $150,000.00 again by that method of reasoning.

I hadn't thought of it before, but I was [61] impressed by the illustration that Mr. Dougherty gave on the stand, which I think is right, that those creditors, because they were fortunate in having their cases combined and getting a fair and better deal than they would if they had employed their own counsel. Their case could not have been handled at all, and would have cost them much more, and would have been called to put up a very higher percentage.

Mr. Morgan: Thank you, very much. Any questions, your Honor?

The Court: No.

Mr. Morgan: Q. Mr. Gust, how long have you known Mrs. Monaghan?

A. Oh, I have known Mrs. Monaghan, I think I met her before she was admitted. At any rate, I have known her ever since she was admitted.

Q. You have observed her work, I presume, Mr. Gust? A. Yes, I have quite a bit.

Q. You consider her an attorney of ability?

A. I do.

Q. And integrity?

(Testimony of John L. Gust.)

A. Yes, and of special ability to do the kind of work she did here. She generally goes after you once she starts after you pretty hard, as she [62] did in this case.

(The witness was excused.)

FRANCIS D. CRABLE

was called as a witness on behalf of the Petitioner Monaghan, and being first duly sworn, testified as follows:

Direct Examination

Mr. Morgan:

Q. Your name?

A. Francis D. Crable.

Q. Where do you reside, Mr. Crable?

A. Prescott, Arizona.

Q. You are a practicing attorney?

A. Yes.

Q. How long have you been practicing?

A. A little over twenty-five years.

Q. During all of that period in Arizona?

A. Yes.

Q. I presume you are admitted in California too? A. Yes.

Q. And in all the Federal Courts?

A. Except the Supreme Court of the United States.

Q. Now, during your practice have you been in-

(Testimony of Francis D. Crable.)

volved in cases of some magnitude involving a [63] million dollars? A. Yes.

Q. Would you mind detailing some of those cases?

A. Some receiverships, and in contested will matters, and in general practice, Mr. Morgan, not all a million dollars, however, that is an exception.

Q. I believe you were employed in the Lowell Estate?

A. I represented the Trustee in the Lowell Estate.

Q. That involved a million and a half?

A. More than that.

Q. Two million dollars.

A. Just about two.

Q. You have also been the attorney for the Receiver on the appeal in the Arizona Power Company matter?

A. Yes, I was also trustee there.

Q. You are familiar, then, with fees in cases of this character? A. Yes, I think so.

Q. Where large amounts were recovered?

A. I think so.

Q. How long have you known Mrs. Monaghan?

[64]

A. Fifteen years.

Q. Have you had an opportunity to observe her while she was practicing law? A. Yes.

Q. State to the Court your opinion of her ability and integrity as a lawyer.

(Testimony of Francis D. Crable.)

A. Her ability, I think I would consider her a very able lawyer. She is an attorney that has great energy, and has a knack of going after details and accumulating details such as she did in this particular case. She is untiring in her effort and in her work.

Q. What have you to say as to the fees when they are taken on a contingent basis rather than on a regular retainer, paid in advance? Do you think a lawyer is entitled to greater fees?

A. Always.

Q. And that proportion of your testimony would be about the same as Mr. Gust's?

A. Would be about the same as Mr. Gust's, and for the same reasons as given by him.

Q. I presume you heard the testimony given here in Court, given by Mrs. Monaghan and her associate counsel, Mr. Thomas W. Nealon?

A. I did, and I have also read Mrs. Monaghan's petition. [65]

Q. All right. Now, then, do you know—to save time, you heard the questions that I asked Mr. Gust. Based upon, or what you have heard in court here and what you know about these attorneys, both of them, taking into consideration the work that was done on a contingent basis, the results that were attained, the case was very hazardous, what would you say would be a reasonable fee?

A. Figuring in percentages, a reasonable fee for the combined services I would say would be seven and one-half per cent, or in dollars on Two

(Testimony of Francis D. Crable.)

Million, that would be One Hundred and Fifty Thousand. I heard the testimony of the attorneys who preceded me on the stand. Mr. Gust stated that he allowed some shrinkage, I think. I think another reason for feeling that the fee should not be ten per cent, and that is, that the matter has not yet been completed. The fund is not at this moment ready for distribution. There is further work to be done. While that should not lessen the value of the services rendered by these attorneys, nevertheless, I think it is something that the Court would consider, and that is why I feel that seven and one-half per cent is fair and reasonable.

Q. I take it, then, you took into consideration the fact that while the effort of these [66] attorneys resulted in impounding into the Court in behalf of the creditors Two Million Dollars, the estate still has to be liquidated, money has to be liquidated and paid out?

A. Yes, I understand this litigation is pending still.

Mr. Morgan: I believe that is all, Mr. Crable. Does the Court have any questions?

The Court: No.

Mr. Morgan: Q. Now assume, Mr. Crable, that Mrs. Monaghan's petition and Mr. Nealon's petition are to be separately entertained and that the fees are to be allowed to each of them separately, what would you say would be the correct proportion or amount to allow Mrs. Monaghan?

(Testimony of Francis D. Crable.)

A. First, Mr. Morgan, I have the same opinion of Mr. Nealon as has been expressed by the other attorneys.

Q. Yes.

A. A high regard for his ability and integrity and character. I have—it is my impression that—in fact, I got this from Mrs. Monaghan's testimony, that Mr. Nealon was in court in the major matters. As against that, however, I off-set that by the fact that Mrs. Monaghan was the one who was employed. In other words, this is her case, and [67] the matter of to whom the business comes is an element to be considered, I think, in fixing a fee, so off-setting the fact it was her case against Mr. Nealon's appearances in court, I would have no hesitancy in saying that the division should be equal.

Mr. Morgan: Thank you, sir. Mr. Clark.

(The witness was excused.)

E. S. CLARK

was called as a witness on behalf of Petitioner Monaghan, and being first duly sworn, testified as follows:

Direct Examination

Mr. Morgan:

Q. What is your name, please?

A. E. S. Clark.

(Testimony of E. S. Clark.)

Q. And your profession, may I ask, for the record?

A. Well, in my own opinion I am a lawyer.

Q. How long have you been practicing law, Mr. Clark?

A. Pretty close to a half century, now.

Q. Mainly, I believe, in Arizona?

A. Nearly all the time in Arizona.

Q. However, I think you have tried cases in [68] California, New Mexico and elsewhere?

A. Oh, yes. I was still a "sage brush lawyer".

Q. You are admited to all the Federal Courts, including the Supreme Court of the United States?

A. Yes.

Q. At the present time I believe you are a resident of Phoenix? A. Yes.

Q. Prior to that time you were a resident of——

A. (Interrupting): Prescott.

Q. Now then, during your experience as an attorney, have you had occasion to be involved in cases of considerable magnitude?

A. Yes, I have been involved in at least two, involving something over Two Million Dollars.

Q. Here is Arizona? A. Yes.

Q. Have you represented plaintiffs in class suits of this character?

A. I don't think in a case exactly like this I ever did. I have represented class plaintiffs in suits somewhat similar, but not exactly like this one.

Q. That is, corporate suits, minority stockholders, I presume? A. Yes. [69]

(Testimony of E. S. Clark.)

Q. You are familiar with the fees, I take it, that should be allowed counsel, are entitled to in cases where fees are charged on the contingent basis?

A. I think so, Mr. Morgan. I have been observing those matters for a good many years.

Q. Do you agree with Mr. Gust that where fees were taken on a contingent basis they should be greater proportionately than those paid in advance on a regular retainer?

A. I certainly do.

Q. You agree with his proporations?

A. Not entirely. I think in a case like this, being exceptional, as I view it, the allowance to the attorneys eventually should be considerably more than in the ordinary contingent case.

Q. You were in court, I take it, and heard the testimony given by Mrs. Monaghan, and also that given by her associate counsel, Mr. Thomas W. Nealon? A. I was, yes.

Q. You have also read the verified petition of Mrs. Monaghan, detailing the work that was done and the results accomplished?

A. Yes, I have read it carefully.

Q. Now, are you acquainted with Mrs. Monaghan? [70]

A. Oh, for more years, I guess, than I ought to confess on the stand. Ever since she came to Arizona, Mr. Morgan.

Q. Have you had an opportunity to view her legal work, observe her capabilities as a lawyer?

(Testimony of E. S. Clark.)

A. Yes, quite often.

Q. Just frankly state to the Court your opinion of her ability and integrity and general standing as an attorney in this community and in this State.

A. Well, I am inclined to agree with what Mr. Crable said about that. She is very energetic, painstaking lawyer with a genius for acquiring information; that is, of importance in a case she happens to be associated in. I think she is a lawyer of high character and somewhat, at least as far as women lawyers are concerned, exemplary.

Q. You are also acquainted with Mr. Nealon?

A. Very well.

Q. How long have you known Mr. Nealon?

A. Well, I have known him, I should say, close to fifteen years.

Q. Are you able to make a statement as to his ability as a lawyer?

A. Yes, I think he is a lawyer of very high ability and unimpeachable integrity, and a very [71] successful lawyer. He is highly diligent; he has an excellent conception of legal principles, and he knows very thoroughly how to apply them. In all respects, I consider him a very high class lawyer.

Q. Now, Mr. Clark, taking into consideration the testimony of these witnesses, what you have read in the verified petitions, the fact that this work or employment was undertaken on a wholly contingent basis; that the case was highly hazardous; that it involved litigation and work consuming approximately three and a half years, and approximately

(Testimony of E. S. Clark.)

two and a half years of continuous work, also the court proceedings which have been testified to, or which are shown in the petitions, the difficulties encountered, the obstacles interposed, including intervention of the Bank Examiner of Utah, Mr. Malia: appeals to the Circuit Court of Appeals and to the United States Supreme Court; the questions which were involved in this particular case, and that as a result of the efforts of these attorneys, assets amounting to approximately Two Million Dollars have been impounded in court to the benefit of all creditors of the Association, what, in your judgment, would be a reasonable fee for such [72] services?

A. Well, Mr. Morgan, I find it difficult to think of a parallel case to this. I think this case involved more difficulties in the inception than almost any case I have ever had any knowledge of. It required not only accurate, but good judgment and a very thorough knowledge of the law applicable to the case, to start with. It required a vast amount of work as the petition reveals before counsel could even come to an intelligent judgment as to whether they should go ahead or not, and considering all those things and the fact that out of what looked to be at the time, because this case came to my attention early, and I am frank to say that I turned it down, I think it was a monumental achievement that these lawyers have brought about, and I agree with Mr. Gust and Mr. Crable that approximately One Hundred and Fifty Thousand Dollars would be a very fair and reasonable allowance.

(Testimony of E. S. Clark.)

Q. Assuming now that those petitions are to be entertained separately, and a separate allowance was to be made to the attorneys, are you able to express what sohuld be allowed to Mrs. Monaghan?

A. Well, it would be very difficult, as both Mr. Gust and Mr. Crable said, to arrive at a just [73] estimate of the value for the services rendered by each of these lawyers. I would prefer to put it on the same basis that they did, that whatever fee is finally allowed by the Court could be divided equally between them.

Mr. Morgan: That is all, and thank you very much. Now, Mr. McCluskey.

HENRY S. McCLUSKEY

was called as a witness on behalf of the petitioners, and being first duly sworn, testified as follows:

Direct Examination

Mr. Morgan:

Q. Your name, please?

A. Henry S. McCluskey.

Q. I believe you were the Receiver for the Intermountain Building & Loan Association?

A. Yes.

Q. First appointed as Receiver pendente lite and later finally appointed as Receiver? A. Yes.

Q. At the time of your appointment as Receiver and the assets were turned over to you, did you make an inventory of the assets of this Company?

(Testimony of Henry S. McCluskey.)

A. Yes, under authority of the Court, I employed [74] Mr. James A. Smith of the Plunkett Audit Company, a firm of public accountants, to make an inventory, and inasmuch as no inventory was available.

Q. Did you arrive finally at a fair valuation for these assets?

A. Well, what we did was took the book value inasmuch as the assets were distributed over many states and Canada, and due to the economic condition prevaling, the condition of the properties, the changing economic conditions, it was deemed advisable to eliminate the necessity for making an appraisal of the value of the properties, so the so-called book value of the properties as carried on the books of the Corporation was taken as the inventory value. Subsequently, in making my report, we took the book values and deducted from them the adjustments that had been made, and charged up as an asset comprising the interest that was based upon usurious charges and the interest and various other charges that was credited as assets, and eliminated those. We allowed them the losses that had been taken on realization, that is, being the difference between the so-called inventory or book value and what we had sold the properties for, and then cases where we had compromised the indebtedness for less than the [75] inventory or the book value, we took that as a book loss, and then with reference to the properties that remained in our possession in Arizona, based upon my inspection and some appraisals that had been made, we estimated what

(Testimony of Henry S. McCluskey.)

the fair, or what we believed the fair value as of the time we made the report, and upon those factors we arrived at what we believed was the present, or the value of the assets at the time we turned them over to Mr. Hill. With reference to the assets in foreign states, based upon the information that was available in the files and upon appraisals that had been made and that were available, we estimated there would probably be a loss up to forty per cent upon realization.

With reference to certificate loans; that is, where a certificate holder had borrowed and given his note and had put up his certificate as security for the loan, we took them on their face value as to an off-set, that one would off-set the other, and upon those factors combined we arrived at the figure that was stated in the report at approximately Two Million Dollars, Two Million, One Hundred Thousand, I think.

Q. Yes, about Two Million, One Hundred Thousand.

A. In round figures, and that is to the best [76] of my ability, that is the estimate we placed upon the value of the assets.

Q. That would be approximately the amount that these attorneys brought into the jurisdiction of the Court by their efforts? A. Yes.

Mr. Morgan: That is all unless the Court has some questions.

(The witness was excused).

JAMES A. SMITH

was called as a witness in his own behalf, and being first duly sworn, testified as follows:

Direct Examination

Mr. Morgan:

Q. What is your name?

A. James A. Smith.

Q. Where do you reside, Mr. Smith?

A. Phoenix, Arizona.

Q. What is your profession?

A. I am the managing partner of the W. H. Plunkett Audit Company, a partnership doing public accounting. I, myself, am a certified public accountant in the State of Arizona.

Q. How long have you been an accountant?

A. I have been an accountant for the last [77] twenty years. I have been a certified accountant since 1926, when I took the examination for the degree of Certified Public Accounting with the American Institute of Accountants, and hold that certificate.

Q. Prior to 1932 and 1933 had you handled building and loan accounts?

A. Yes, I had been handling some building and loan accounts.

Q. Was that sort of special work?

A. Yes, that was special work, because of the fact building and loan accounting is entirely different than any banking or any mercantile, or any other type of financing. A building and loan is a specialized thing.

Q. In a general way, have you made—have you

(Testimony of James A. Smith.)

practiced your profession and made accounting jobs in the State of Arizona?

A. Yes, I have done work for the State of Arizona throughout the State of Arizona. I have handled banking work for defunct banks, such as the bank that went broke over in Duncan, the Bank of Duncan, and the Bank of Safford. I handled the Building and Loan Asosciation in Tucson that went broke and made an audit for the benefit of the Banking Department. I have handled accounts throughout [78] the State and other states.

Q. What are the usual fees and charges on a per diem basis?

A. Well, the fee basis varies, depending on the nature of the work. It has been customary throughout the past years for certified accountants to receive from twenty to thirty-five dollars a day for their work. That was up until some time around 1927 or 1928. Thereafter, the fees began to be more popularly increased as the work of the accountants was better understood. In my ownoffice, the fees that have been charged by Mr. Plunkett, my senior partner, and myself, he also being certified, ran from thirty-five to fifty dollars a day for ordinary office work, and from fifty to a hundred dollars a day for court work, and usually fifty dollars a day for court preparatory work. In addition to that—that is the regular per diem. That is a 7-hour accountant's day, nine to five, or any other 7-hour period. Court work constitutes the length of the day. If it is five hours, six hours or seven, it does not make any difference.

(Testimony of James A. Smith.)

Q. Where specific specialized knowledge is required, such as in building and loan cases, would that demand or authorize a greater charge? [79]

A. Well, in the beginning, from the legal standpoint which would be involved in that case, yes, because of the fact that the specialized type is something that lies purely within the mind of the man who has had experience. It is not general knowledge. It is specific knowledge, and, therefore, it has greater value whether it be a building and loan or anything else. If it was something specifically required and had a relation to a man's particular knowledge and ability, it would be more valuable than general work.

Q. When your fees are contingent, are you authorized and is it usual to charge a greater fee?

A. Oh, yes, invariably. Contingent fees are usually double whatever we might have charged under usual circumstances, and so allowed by the Court. Contingent fees are considered at least double to the amount of the regular fee.

Q. Will you state to the Court briefly your activity in the present case?

A. In the present case, Mrs. Monaghan and Mr. Nealon came to me. I don't recall at this time who preceded the other, but it was with the knowledge of both. I know that they came to me and asked me if I would help them in the matter of this Association in determining certain factors. [80] First, we went upon a hypothetical basis purely. We assumed and thought of various things and discussed the accounting methods that we happened to have some

(Testimony of James A. Smith.)

knowledge of. We discussed the accounting methods as they should be, and I made special research into matters pertaining to building and loan financial costs, actuarial tables, cost of money, and the general practice in building and loan associations, and made, at a later date, calculations. Mrs. Monaghan had made some calculations based upon some reports from Utah. I supplemented those calculations and checked thoroughly all that she had made, and made a more detailed schedule of the operations and schedules of the cost and the cost of money to the full schedule of the losses that must have been engendered throughout the period. There were conferences on matters and policies, conferences as to witnesses, conferences as to the general trends, whether or not the testimony was going in in a proper way, and an analysis of testimony on building and loan matters in other similar Intermountain cases.

I very often attended Court. In fact, up until the time the final suit, the final hearing I have, nearly every time Judge Nealon and Mrs. Monaghan came in this court or any other court, I accompanied [81] them, and besides that, I took part in all proceedings. In other words, assisted the attorneys in getting information and analyzing it for their benefit.

That, briefly—it is all set out in the exhibit I set forth, and that is set forth in Mrs. Monaghan's——

Mr. Morgan: I believe you submitted a memorandum?

A. Yes, I submitted a memorandum.

(Testimony of James A. Smith.)

Q. Just a repetition? A. That is right.

Q. Do you now swear that the statements made in that memorandum, Exhibit A attached to Mrs. Monaghan's petition, are true? A. I do.

Q. How many days approximately did you spend on this work?

A. Well, at the time we started in, I kept a memorandum. It was customary to keep a memorandum in our office at that time. At the time of my employment, but after it dragged down for a period of time, we moved our offices, and those original memoranda were lost, but there was still considerable work having to be gone over, and not having recalled the definite specific amount of [82] time, I would say, and as I remember, that the time involved was somewhere between 120 and 150 days. In other words, from about four, four and a half or five months time. They would spend as much as a week or ten days at a time continuously, and at other times it would spread out over the entire investigation.

Q. During all that period your office was open to them?

A. My office and library, which is very extensive in the matters of accounting and a great deal of law, and my office machinery or equipment, anything that required stenographic service, my office was open at any time it was required.

Q. Did this work present difficulties in accounting by reason of the lack of records?

A. Yes, the work presented difficulties from any other accounting that might be ordinarily had in

(Testimony of James A. Smith.)

this respect, that we had only sworn statements of reports, or sworn reports which showed the assets and liabilities in the Association as stated by the Association, and showed a summary only of the gross receipts and the gross disbursements. There was no books of original entries to which we could have access. We could not have an orderly method, such as the employees, the juniors and [83] seniors all working out the accounting from the books of original entry. It had to be done from certain assumptions of facts and then taking specific reports and breaking them down, as we call accounting, to determine wherein the weakness lay. In other words, when it became apparent in breaking down the accounting where liabilities were not truly shown, we had to find out just where, and we had to do that in all of the phases which made it very hazardous, because of the fact when an accountant is called on the witness stand to testify to the solvency or insolvency of a corporation from an examination, the burden rests upon his shoulders. In the event he should have been foolish enough, he might attempt to prove the solvency, and then the testimony which would be given, it would affect your case, perhaps, from the serious financial condition that would later arise.

Q. I believe your work was mostly with Mrs. Monaghan in the beginning?

A. My work was with Mrs. Monaghan in the beginning because Mrs. Monaghan and I went over these figures as to the earnings and the various rates

(Testimony of James A. Smith.)

of money, and so forth, and that was in the inception, I think, before the suit was ever filed [84] at all, in order to find out whether or not we had something.

Q. You recall studying the report she procured from Utah? A. Yes.

Q. You worked back from those, I understand?

A. Yes.

Q. The result of that work, you were able to show a state of insolvency? A. Yes, indeed.

Q. Are you able to say now approximately how much money, on an average, this corporation was losing or was dissipating?

A. Well, they were dissipating profits and losing money as a direct result of the failure to have profits at the progressive rates. In other words, the more business they sold, the faster they were going broke, but the more readily it was covered up, so that the progression was increased as the years went by from 1920 to 1932. As I recall, there was close to $30,000.00 deficit, a loss in the first year's operation, and thereafter it varied upward until it finally arrived at somewhere near $200,000.00 in one year.

Q. If that continued, nothing would have been left for the creditors? [85]

A. On the ratio they were losing money to the operations as of 1932, had that continued over a period of a very few years, they would have been absolutely without assets.

Q. Now, what do you fix as a reasonable value for your services?

(Testimony of James A. Smith.)

A. I fix a value of $10,000.00 as the amount that I have plead to Judge Nealon and Mrs. Monaghan, and as a reasonable value for my services.

Q. By the way, have you been paid anything at all? A. No, I have never received a dime.

Q. What was your agreement with counsel?

A. My agreement with counsel was that in the event anything came out of this, they would petition the Court for a proper and reasonable allowance for my services.

Mr. Morgan: That is all.

The Witness: No other value.

Mr. Morgan: I believe that is all, Mr. Smith.

(The witness was excused).

Mr. Morgan: Mr. Sperry. [86]

RALPH E. SPERRY

was called as a witness on behalf of the Petitioner Smith, and being first duly sworn, testified as follows:

Direct Examination

Mr. Morgan:

Q. What is your name?

A. Ralph E. Sperry.

Q. Where do you reside?

A. Los Angeles, California.

Q. What is your profession?

A. Certified public accountant.

(Testimony of Ralph E. Sperry.)

Q. Are you a graduate accountant?

A. A graduate of the University of Illinois.

Q. What year? A. 1918.

Q. Did you do special work later on in Illinois?

A. Yes, I was for a year and a half engaged in public accounting work in Chicago.

Q. Were you admited there as a certified public accountant? A. Yes, sir.

Q. Since that time where have you been?

A. I came out to California in 1921, in the Fall, with the Security Trust & Savings Bank in [87] Los Angeles from December, 1921, to December, 1928.

Q. Are you a certified public accountant of that state? A. I am.

Q. In a general way, will you state just very briefly what your experience in accounting has been?

A. It has been general during the period in Chicago. It has been general during the last two or three years preceding to the—it has been specialized as to financial matters principally, I should say, from 1921 to about 1935.

Q. Have you been engaged, for instance, in accounting in a corporate reorganization?

A. I have.

Q. Have you done court work?

A. I have.

Q. In connection with estates?

A. During the period, I think 1932 to October, 1935, I was President of the Management Corporation, a subsidiary of Banks-Humby & Company,

(Testimony of Ralph E. Sperry.)

stock and bond dealers of Los Angeles, California, who organized this corporation to work out as effective as possible reorganizations for certain default real estate bond dealers and certain other dealers they had an underwriting interest in. During that time I served as Secretary, I think. [88]

Q. I take it you are familiar with the character of work that has been testified to by Mr. Smith?

A. Not so much his own work as I am with the general type of work, yes, sir.

Q. Is it usual for accountants to charge per diem rates?

A. That is the more ordinary type of basis.

Q. What is the usual charges in your——

A. (Interrupting) Twenty-five to Fifty Dollars per day or up, depending on the type of services.

Q. And what are the proper charges for court appearances?

A. Fifty to One Hundred Dollars per day, or up.

Q. In accounting work, what do you call a day, how many hours?

A. Straight accounting work, about seven hours.

Q. Now, where work is done on a contingent basis, is it proper to charge an additional amount?

A. Distinctly.

Q. In special cases requiring specialized knowledge, is it proper, in your profession, to charge special fees beyond the ordinary rates?

A. Yes, sir.

Q. What is the reason for that; what is the [89] basis for it?

(Testimony of Ralph E. Sperry.)

A. Because all that an accountant or an attorney has to sell is his services, and where his services are marked as special value, it is entirely proper to have that value recognized in the fee.

Q. You were in court and heard the testimony of Mr. Smith? A. Yes, sir.

Q. You also heard Mrs. Monaghan's testimony concerning he work he did? A. I did.

Q. Now, then, based upon that testimony, assuming that an acocuntant of Mr. Smith's ability—by the way, did you know Mr. Smith—have you known him before this time?

A. Not before this time, no, sir.

Q. Assuming an accountant, especially an accountant, a certified public accountant who has practiced his profession for a number of years and is an able accountant, is employed by a number of attorneys in this case to represent them in the work, in the matter concerning the recovery from a corporation more than Two Million Dollars for the benefit of creditors, and assume that that accountant has been called upon to make [90] an analysis of reports in order to reduce the status of the corporation as to solvency or insolvency, and, further, that the books of original record are missing from which audits are usually made, but that through research and general knowledge the necessary information to show the true facts by analysis and otherwise is obtained, and a conclusion reached as to the solvency or insolvency, and that that service is extended over a period of more than two years, in-

(Testimony of Ralph E. Sperry.)

cluding approximately 125 to 150 days, as testified to in court here, what would you say would be a fair charge for such services?

A. On a contingent basis?

Q. On a contingent basis, yes.

A. I should say $15,000.00.

Q. Upon what do you base than answer?

A. I base it upon the unusual characteristics of the work itself, upon the benefit to the client, upon the hazards involved, the risks taken from the inception, when even after a year's work may have been completed, some particular thing might throw the whole case out; upon questions as to when the fee might be paid, if even earned, the various contingencies involved, particularly having in mind the significant qualities of the [91] service itself, as I have heard them expressed in the court room today.

(The witness was excused.)

Mr. Morgan: I think that is all. That, your Honor, completes the case on behalf of this petitioner. You have something further?

Mr. Nealon: No, I want to make a couple of motions if you are through.

Mr. Morgan: Yes.

Mr. Nealon: I want to file two separate—introduce petitions and memorandums on points of authorities, and in doing so, I file this petition asking first that the sum of $1,330.40 for the out-of-pocket expenses which I have testified to, and to which your Honor is directed, I think that should be a separate order, and it will be very acceptable if that payment

was made. I may prefer—I will make the motion now for payment of the $1,330.40 to me for my out-of-pocket expenses here. Your Honor can rule on it after you give it consideration.

Now, I am looking at this case a little bit from that viewpoint of a man seventy years of age. I don't think in the present state of the case that all of the fees should be paid at the present time. Witnesses on the stand have [92] testified to the part I was going to bring up myself, but I do think it will be only fair to the attorneys in the case that at the present an allowance of some like amount would be proper. I, therefore, am filing this petition, and am asking for an allowance of $12,500.00 at the present time upon account of the fees. Your Honor can fix the fees at your leisure. I think these should be fixed on the percentage basis. This amount would be less than Five Dollars apiece, about Four-Fifty or Fifty-Eight from each of the people who have been benefited by the services. It would also leave in the treasury more than sufficient to declare a ten per cent dividend to these creditors, and I may say personally that I see no reason why a dividend should not be declared at any time your Honor deems proper. You can sustain the payment of the dividend so far as those people are claiming under the statutes out of the State, and about $12,500.00 will help an attorney to get along especially after he has been out of money as I have been in this case. I submit this and make the motion.

The Court: All right. Let the record show it is submitted.

Mr. Nealon: And I will furnish you these [93] points on authorities which I think cover every phase on the allowance of this. I want to call your attention to the two cases, one in the Circuit Court where ten per cent was allowed.

Mr. Morgan: Have you got a copy of this?

Mr. Nealon: Yes, I have.

Mr. Morgan: I have numerous decisions I would like to call to your Honor's attention to, but I presume Mr. Nealon has already done it. Was the $12,500.00 for yourself individually?

Mr. Nealon: That is for myself.

Mr. Morgan: I was going to state that Mrs. Monaghan, in addition to the Two Hundred and some odd dollars included in her associate counsel's report, says that she has spent $301.65. I didn't have her testify to that because it was in her petition, $301.65, and if, of course if there are intermediary allowances, we think it would be highly proper to make some immediate allowance to both of them, and that $301.65 should be repaid to her at once, together with such amount that the Court sees fit to allow immediately, if the Court decides to handle it that way, and that also some provision should be made for the payment of Mr. Smith, because his work was of a very high character, and he assisted the attorneys greatly. [94] In fact, probably the case could not have been won without Mr. Smith's services.

I have, I say, any number of authorities on the exhibit. Ordinarily, the fees that are allowed in these cases, even by the Supreme Court of the

United States, is right close to $50,000.00 where there is a recovery and payment over to the client. Of course, as stated by counsel that we put on the stand, that ten per cent probably should be decreased to some extent, because of the fact that the administration of the fund and the liquidation of the fund requires further, additional services. That is to say, if these Two Million, immediately upon the entry of the decree could have been paid over to the creditors, then unquestionably these counsel would have been entitled to, under the decisions, to that amount as a fair and just fee, but in view of the fact it has to be liquidated over a period of years, possibly, that amount should be reduced.

The Court: All right. The record may show the matter is submitted.

(The hearing was ended at four-forty-five o'clock, P. M., of the same day.) [95]

I hereby certify that the proceedings had upon the trial of the foregoing cause are contained fully and accurately in the shorthand record made by me thereof, and that the foregoing 95 typewritten pages are a full, true and accurate transcript of said shorthand record.

LOUIS L. BILLAR
Shorthand Reporter.

[Endorsed]: Filed Feb 23, 1943.

[Endorsed]: No. 10408. United States Circuit Court of Appeals for the Ninth Circuit. Elizabeth G. Monaghan, Appellant, vs. Harry W. Hill, as Receiver of Intermountain Building and Loan Association, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed April 23, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the District Court of the United States for the District of Arizona

No. 10408

No. E-268-Phoenix

GUADALUPE R. GALLEGOS, et al.,

Plaintiffs,

vs.

INTERMOUNTAIN BUILDING & LOAN ASSOCIATION, a corporation,

Defendant.

STATEMENT OF POINTS ON WHICH ELIZABETH G. MONAGHAN INTENDS TO RELY ON THE CONSIDERATION OF HER APPEAL.

Pursuant to Rule 19 (6), Rules of the United

States Circuit Court of Appeals for the Ninth Circuit, the appellant files this Statement of Points upon which she intends to rely on the consideration of her appeal:

I.

That the court erred in making its finding of fact No. XVIII, on the ground that the same is not supported by the evidence, and is contrary to the evidence, in that the record shows that the expenses incurred and for which reimbursement was asked, were in addition to those set up by petitioner Nealon in his petition and paid to him, and that it was an abuse of sound judicial discretion for the court to deny to the petitioner the costs and expenses necessarily incurred by her in the litigation.

II.

That the court erred in making its finding of fact No. XIX, on the ground that the same is not supported by the evidence, and is contrary to the evidence, in that the evidence conclusively shows that Mr. Smith's work, preparation and evidence were essential to establishing plaintiffs' case and that the same could not have been established without such preparation, work and evidence; and in that one jointly interested with others in a common fund, and who in good faith maintains the necessary litigation to save it from waste and destruction, and to secure its proper application, is entitled, in equity, to reimbursement of his costs as between solicitor and client, or out of the fund itself or by proportionate contributions from those who receive

the benefit of the litigation, and it was an abuse of sound judicial discretion for the court to deny costs for the services of James A. Smith, C.P.A.;

III.

That the court erred in making its finding of fact No. XX, on the ground that the same is not supported by the evidence, and is contrary to the evidence; and that the services rendered by the appellant as one of the attorneys for the receiver, subsequent to the adjudication of insolvency and his appointment as receiver, have no application to the value of the services in instituting and prosecuting to a successful conclusion the original action for which compensation is sought; are entirely independent thereof, and are not a proper element to consider in determining appellant's compensation as attorney for the plaintiffs and those similarly situated; and it was an abuse of discretion and inequitable for the court to take into consideration the compensation for such services rendered the receiver subsequent to his appointment, in fixing the fee for the attorney for the petitioning creditors in the original action;

IV.

That the court erred in making its finding of fact No. XXII, on the ground that the same is not supported by the evidence, and is contrary to the evidence, and is unreasonable, grossly inadequate, arbitrary and inequitable, and does not reasonably compensate appellant for the services rendered and

costs incurred, considering the amount of the fund brought into court by the services of the petitioner; the time and amount of work involved; that the case was extremely hazardous; the many unique and complex principles and facts involved which were not easily demonstrable; the conflicting claims as to state and federal jurisdiction, including the claims of statutory liquidators; the fact that the case was vigorously contested in the District Court, with appeals to the Circuit Court and to the United States Supreme Court; and that most of the litigation was determined prior to the appointment of the judge fixing the fee;

V.

That the court erred in making its finding of fact No. XIV, in that it established an inequitable premise upon which to calculate and base an equitable fee for counsel bringing the fund into court, and it was an abuse of sound judicial discretion for the court to establish such premise in fixing the fee for the attorney for the petitioning creditors in the original action;

VI.

That the conclusion of law No. (1) is based on the erroneous finding of fact Nos. XIV, XX and XXII; is contrary to law and equity, and to the evidence, for all the reasons set forth hereinabove in paragraphs III, IV and V;

VII.

That the conclusion of law No. (2) is based on the erroneous finding of fact No. XVIII; is contrary to law and equity, and to the evidence, as set forth hereinabove in paragraph I;

VIII.

That the conclusion of law No. (3) is based on the erroneous finding of fact No. XIX; is contrary to law and equity, and to the evidence, as set forth hereinabove in paragraph II;

IX.

That the court erred in entering its order fixing the total compensation of Elizabeth G. Monaghan on account of services rendered by her as an attorney in the preparation, institution and trial of the foregoing and numbered cause, as set forth in her petition, at $12,500.00, on the ground that said order is based on the erroneous findings of fact Nos. XIV, XX and XXII, and on the erroneous conclusion of law No. (1); and on the further ground that the same is not supported by the evidence, and is contrary to the evidence, and is unreasonable, grossly inadequate, arbitrary and inequitable, and does not reasonably compensate appellant for the services rendered, and for all the reasons set forth hereinabove in paragraphs III, IV and V;

X.

That the court erred in entering its order denying to appellant the expenses and allowances necessarily incurred by her in the preparation and prosecution

of the original action, as set forth in her petition, on the ground that said order is based on the erroneous findings of fact Nos. XVIII and XIX, and on the erroneous conclusions of law Nos. (2) and (3), and is contrary to law and equity; and on the further ground that said order is not supported by the evidence and is contrary to the evidence, for the reason that said costs were necessary and essential to the successful bringing and prosecuting of said action, and for all the reasons set forth hereinabove in paragraphs I and II;

XI.

Where an attorney institutes litigation for clients, and with the consent of clients associates another attorney, the acceptance of an inequitable fee by the attorney so associated cannot deprive the attorney bringing the suit of a reasonable fee, especially where the associate counsel has good grounds not to contest the inadequacy of the fee.

XII.

The Circuit Court of Appeals may increase the allowance to the appellant without disturbing the allowance to the associate counsel.

Dated at Phoenix, Arizona, this 12th day of April, 1943.

HENRY S. McCLUSKEY,
Attorney for Elizabeth G. Monaghan.

Received copy of the foregoing Statement of Points this 12th day of April, 1943.

LOUIS B. WHITNEY

Attorney for Harry W. Hill, as Receiver of Intermountain Building and Loan Association, a corporation.

[Endorsed]: Filed Apr. 24, 1943. Paul P. O'Brien, Clerk.

[Title of District Court and Cause.]

STIPULATION AND DESIGNATION OF PORTIONS OR PARTS OF THE RECORD TO BE PRINTED AND DEEMED NECESSARY FOR THE CONSIDERATION OF THE APPEAL OF ELIZABETH G. MONAGHAN

It is Stipulated by and between the petitioner, Elizabeth G. Monaghan, through her attorney, Henry S. McCluskey, Esquire, and Harry W. Hill, as receiver of Intermountain Building & Loan Association, an Utah corporation, through his attorney Louis B. Whitney, Esquire, that the Decision of the United States Circuit Court of Appeals for the Ninth Circuit, dated August 5, 1935, (Case No. 7516 in said court) and reported in Volume 78 Fed. (2) at pages 972, et seq., and the Order of the United States Supreme Court denying writ of certiorari in said matter, reported in Volume 206 U. S. at page 639, may be considered by the United States Circuit Court of Appeals for the Ninth Circuit in this

appeal, as though the same were printed in full in the record, but that the same need not be printed by the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit in said Record.

It Is Further Stipulated that the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit shall include in the printed record on said appeal, the following:

1. Amended Bill of Complaint, filed June 23, 1933; (T. R. pp. 5-31)

2. Affidavit of James A. Smith, filed April 18, 1933; (T. R. pp. 32-34)

3. Mandate of the United States Circuit Court of Appeals for the Ninth Circuit in Case No. 7516, entered in the above captioned matter on December 2, 1935; (T. R. pp. 35-37)

4. Petitioner Monaghan's Exhibit "B" in evidence, including Statement of James A. Smith attached thereto; (T. R. pp. 38-88)

5. Petitioner Nealon's Exhibit No. 3 in evidence; (T. R. pp. 89-133)

6. Petitioner Nealon's Exhibit No. 4 in evidence, deposition of William H. Burges, (omitting the Notice of Taking Deposition, the Affidavit of Service of Notice and the further Affidavit of Thomas W. Nealon of receipt of the deposition, attached thereto;) (T. R. pp. 134-173)

7. Petitioner Nealon's Exhibit No. 5 in evidence, deposition of Samuel L. Pattee, (omitting the hypothetical question which is identical to that contained in the deposition of William H. Burges, but which may be considered by the Circuit Court of Appeals

for the Ninth Circuit as being asked the witness Samuel A. Pattee, but to save the record need not be reprinted; and omitting further the Notice of Taking Deposition, the Affidavit of Service of Notice and the Affidavit of Thomas W. Nealon of receipt of the deposition, attached thereto;) (T. R. pp. 183-187)

8. Those parts of petitioner Nealon's Exhibit No. 6 in evidence, being miscellaneous bills, receipts and checks, filed December 20, 1937, particularly designated as follows:

(a) Check of Thomas W. Nealon, dated March 20, 1933, numbered 2388, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to the order of Brady & Acheson in the amount of $20.00; together with invoice of Brady & Acheson in such amount addressed to Mrs. Elizabeth G. Monaghan, dated March 15, 1933, covering "Services in re Intermountain Building & Loan Association to date".

(b) Check of Thomas W. Nealon, dated March 22, 1933, numbered 2391, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to the order of Brady & Acheson in the amount of $5.00; together with invoice of Brady & Acheson in such amount addressed to Mrs. Elizabeth G. Monaghan covering "Services in obtaining building and loan report".

(c) Check of Thomas W. Nealon, dated April 25, 1933, numbered 2439, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to Elizabeth G. Monaghan in the amount of $12.00, with notation in upper lefthand corner "Marshal's serv-

ices", endorsed "Pay to Helen Elickson—E. G. Monaghan"; together with statement of United States Marshall rendered to Elizabeth G. Monaghan covering services rendered April 18, 1933, and showing receipt of payment April 26, 1933.

(d) Check of Thomas W. Nealon, dated March 23, 1933, numbered 2394, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to Mrs. S. A. Nelligan in the amount of $5.00; and unnumbered check of Thomas W. Nealon, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to Mrs. S. A. Nelligan in the amount of $12.00; together with notation accompanying above checks "Nelligan—clerical work $17.00).

(e) Check of Thomas W. Nealon, dated April 22, 1933, numbered 2437, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to the order of Arizona Corporation Commission in the amount of $9.00, with notation in upper left-hand corner "cert. copy of incorp Intermountain Bldg. & Loan Assn. Utah"; together with official receipt of Arizona Corporation Commission, numbered 51206, dated April 22, 1933, evidencing payment of $9.00, made to Thomas W. Nealon, covering certified copy of articles of incorporation "In re: Intermountain Building & Loan Assn." Receipt shows payment by check No. 2437.

(f) Check of Thomas W. Nealon, dated May 22, 1933, numbered 2453, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to the order of County Recorder of Maricopa County in the amount of $3.35; together with official receipt of

County Recorder of Maricopa County dated May 22, 1933, to Thomas W. Nealon, covering certified copy of mortgage—Vaughn Riggins, et ux. to Intermountain Bldg. & Loan Assn.

(g) Unnumbered check of Thomas W. Nealon, dated May 14, 1933, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to the order of S. A. Nelligan in the amount of $25.75, endorsed by S. A. Nelligan and cashed in Salt Lake City, Utah.

(Original documents sent to Circuit Court of Appeals.)

9. Final Order fixing attorney's fees and expenses, and ordering payment of balance due, (as to Elizabeth G. Monaghan) entered December 7, 1942; (T. R. pp. 202-205)

10. Final Order fixing attorney's fees and expenses, and ordering payment of balance due to Thomas W. Nealon, entered December 7, 1942; (T. R. pp. 206-209)

11. Findings of Fact and Conclusions of Law, made nunc pro tunc as of December 7, 1942; (T. R. pp. 192-200)

12. Stipulation dated March 5, 1943, as to filing of Findings of Fact and Conclusions of Law, nunc pro tunc; (T. R. p. 201)

13. Reporter's transcript of evidence on hearing of petitions of Elizabeth G. Monaghan and Thomas W. Nealon;

14. Notice of Appeal; (T. R. p. 228)

15. Bond on Appeal; (T. R. pp. 229-230)

16. Schedules "A", Trial Balance as of December 31, 1939; "B", Real Estate Loans, December 31, 1939; "C", Real Estate Contracts, December 31, 1939; "D", Real Estate owned, December 31, 1939; and "E", Real Estate sold, December 31, 1939, all attached to verified Report and Account of Harry W. Hill, as Receiver of Intermountain Building & Loan Association, an Utah corporation, filed March 20, 1940; (T. R. pp. 189-191)

17. Report and Account of Harry W. Hill, as Receiver of Intermountain Building & Loan Association, an Utah corporation, filed February 23, 1943; (T. R. pp. 210-227)

18. Elizabeth G. Monaghan's Amended Designation of parts of record to be transmitted to the United States Circuit Court of Appeals, filed March 18, 1943; (T. R. pp. 237-239)

19. Harry W. Hill's Designation of Additional portions of the Record, proceedings and evidence to be transmitted to the United States Circuit Court of Appeals, filed March 18, 1943; (T. R. pp. 240-242)

20. Order that original portions of Exhibit No. 6, be sent to the United States Circuit Court of Appeals for the Ninth Circuit in lieu of copies thereof; (T. R. pp. 234-235)

21. Stipulation and Designation of portions or parts of the record to be printed, and deemed necessary for the consideration of the appeal of Elizabeth G. Monaghan;

22. Statement of Points on which Elizabeth G. Monaghan intends to rely on the consideration of

her appeal, dated April 12, 1943, and filed pursuant to Rule 19 (6), Rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Phoenix, Arizona, this 12th day of April, 1943.

HENRY S. McCLUSKEY
Attorney for Elizabeth G. Monaghan

LOUIS B. WHITNEY
Attorney for Harry W. Hill, Receiver of Intermountain Building & Loan Association, an Utah corporation.

[Endorsed]: Filed April 24, 1943. Paul P. O'Brien, Clerk.

No. 10961

United States

Circuit Court of Appeals

For the Ninth Circuit.

THOMAS W. NEALON,

Appellant,

vs.

HARRY W. HILL, a Receiver of Intermountain Building & Loan Association, a Corporation,

Appellee.

Transcript of Record

In Two Volumes

VOLUME II

Pages 375 to 686

Upon Appeal from the District Court of the United States for the District of Arizona

FILED

APR 2 - 1945

PAUL P. O'BRIEN,

CLERK

Rotary Colorprint, 55 Eleventh Street, San Francisco

No. 10961

United States

Circuit Court of Appeals

For the Ninth Circuit.

THOMAS W. NEALON,

Appellant,

vs.

HARRY W. HILL, a Receiver of Intermountain Building & Loan Association, a Corporation,

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Upon Appeal from the District Court of the United States for the District of Arizona

Rotary Colorprint, 55 Eleventh Street, San Francisco

ATTORNEYS OF RECORD

LESLIE C. HARDY,

1006 Luhrs Tower,
Phoenix, Arizona.

Attorney for Appellant.

LOUIS B. WHITNEY,

1006 Luhrs Tower,
Phoenix, Arizona.

Attorney for Appellee. [3*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
For the Federal District of Arizona

No. E-268 Phoenix

GUADALUPE R. GALLEGOS, FRANCESCA GALLEGOS, his wife, INGA G. GUDMUNDSEN and MATA E. DEXTER, in their own behalf and in behalf of others similarly situated,

Plaintiffs,

vs.

INTERMOUNTAIN BUILDING AND LOAN ASSOCIATION, a corporation,

Defendant,

H. G. SMOOT and SOPHIA SMOOT, his wife,

Intervenors.

APPLICATION OF RECEIVER FOR APPOINTMENT OF ATTORNEYS and ORDER APPOINTING ATTORNEYS

To the Honorable Fred C. Jacobs, Judge of the United States District Court:

The Application of H. S. McCluskey respectfully shows as follows:

I am the duly appointed, qualified and acting Receiver herein.

In the performance of the duties devolving upon me under and by virtue of the order and decree of the Court herein, it is necessary that I have, and I desire, the services of counsel in connection with the legal questions and proceedings involved.

The property embraced within the trust imposed upon me covers a number of states, and the problems placed before me involve the construction of many state statutes of the right of lienholding creditors of the Intermountain Building and Loan Association.

The records of said corporation disclose that there [4] are many suits now pending and many actions necessarily will have to be brought to protect the interests of the lienholding creditors and others involved in this matter, and the legal work involved is such that it will be necessary to have more than one attorney.

Your petitioner therefore recommends that the attorneys hereinafter named, each of whom has had many years of experience at the Bar of this Court and are qualified to assist me in the performance of my duties, be designated by this Court as my attorneys, to wit: Thomas W. Nealon and Elizabeth G. Monaghan.

Wherefore, your petitioner prays that an order be made herein appointing Thomas W. Nealon and Elizabeth G. Monaghan and that their compensation be fixed by order of this Court.

Dated this 29th day of November, 1935.

H. S. McCLUSKEY
Receiver

State of Arizona
County of Maricopa—ss.

H. S. McCluskey being first duly sworn on oath, deposes and says:

That he is the Receiver in the above entitled matter, and the applicant in the foregoing application; that he has read the same, knows the contents thereof, and that the same is true in substance and in fact.

H. S. McCLUSKEY

Subscribed and sworn to before me this 29th day of November, 1935.

[Seal] C. MERION BERGE
Notary Public

My Commission expires: Oct. 4, 1938. [5]

[Title of District Court and Cause.]

ORDER APPOINTING ATTORNEYS FOR RECEIVER

Upon Consideration of the application of H. S. McCluskey herein for the appointment of counsel for him as Receiver in the above entitled suit,

It Is Hereby Ordered that Thomas W. Nealon and Elizabeth G. Monaghan are hereby appointed attorneys for said H. S. McCluskey, Receiver herein.

Dated this 30 day of November, 1935.

F. C. JACOBS
Judge

[Endorsed]: Entered filed Dec. 2, 1935. [6]

[Title of District Court and Cause.]

RECEIVER'S PETITION PRAYING FOR INSTRUCTIONS CONCERNING TRIP TO UTAH AND OTHER STATES IN REFERENCE TO AFFAIRS OF INTERMOUNTAIN BUILDING & LOAN ASSOCIATION, AND AUTHORIZING EXPENSES THEREFOR

Comes Now H. S. McClukey, Receiver herein, he having been heretofore duly appointed, qualified and now acting as such, and represents to the Court as follows:

That the assets of the defendant corporation which has come into his hands as receiver herein consists largely of promissory notes secured by mortgages upon real estate situated in Utah, Wyoming, Idaho, Oregon, California, etc.

That it is necessary for your receiver and his counsel to investigate the condition of the securities in each of these states and the handling of the affairs of the defendant corporation in each of these states.

That in each of these states there is at this time certain proceedings pending in regard to the property of the defendant corporation therein and the same is in the custody of officials or receivers designated in these states for the handling thereof, all of which actions have been taken subsequent to the time when this Court obtained the constructive possession [7] of the assets of the defendant corporation as appears from the records of this Court.

That it is necessary for your petitioner and his counsel to visit these states to ascertain what steps must be taken for the protection of the assets of the defendant corporation and the necessity of the appointment of ancillary receivers in each of the different jurisdictions for the protection of the interests of the estate.

That owing to the nature of the investigations to be made and the necessity for personal interviews with the present custodians of the property of the defendant and the necessity for consultation with various courts and officials having custody or control of the same, or asserting any custody or control thereof, it is impossible to attend to these matters by correspondence or through agents, and for this reason it is absolutely essential that your receiver and his counsel visit each of these jurisdictions.

That your receiver and his counsel will necessarily undergo considerable expense in the making of this trip and the investigations required.

That your receiver requests that Thomas W. Nealon be designated to accompany him as counsel upon this trip.

Wherefore, your petitioner prays that this Court authorize him and Thomas W. Nealon, his counsel, to make said trip to the various states in which assets of the corporation are situated for the purpose aforesaid, and that your receiver be authorized to take from the funds in his hands such sums as this Court may designate for expenses for himself

and for his counsel on said trip, your petitioner to render an account thereof to this court. [8]

Dated this 28th day of November, 1935.

H. S. McCLUSKEY
Receiver

State of Arizona
County of Maricopa—ss.

H. S. McCluskey, being first duly sworn on oath deposes and says: That he is the Receiver of the Intermountain Building and Loan Association, and the petitioner in the foregoing petition; that he has read the same, knows the contents thereof, and that the same is true in substance and in fact.

H. S. McCLUSKEY

Subscribed and Sworn to before me this 29th day of November, 1935.

[Seal] C. MERION BERGE
Notary Public

My Commission expires: Oct. 4, 1938.

[Endorsed]: Filed Dec. 2, 1935. [9]

[Title of District Court and Cause.]

ORDER AUTHORIZING RECEIVER AND HIS COUNSEL TO MAKE A TRIP TO UTAH AND OTHER STATES AND ALLOWING EXPENSES THEREFOR

The Petition of H. S. McCluskey, Receiver herein, coming on to be heard, the petition request-

ing instructions concerning a proposed trip to Utah and other states for the purpose of inspecting the securities of the defendant corporation in such states covering the property now in the possession of this court by virtue of the decree hereinbefore rendered, and for conferences with the custodians of the property of the defendant corporation in such states; and for conferences with such courts and officials who may be exercising any control over any property of the defendant corporation; and for the purpose of investigating the necessity for ancillary proceedings in any of such states, legal or otherwise, for the protection of the assets of the defendant corporation now in the custody of this Court; and for the purpose of entering into arrangements for the care, custody and protection of such assets; and praying that this court authorize said receiver and Thomas W. Nealon, his counsel, to make such trip and expend the necessary amount of money for the expenses of such trip; [10]

And it appearing to the Court that it would be for the best interests of said Intermountain Building and Loan Association, and its lienholding creditors that such trip and such investigation be made by said receiver and his counsel, and would be of great value to the estate in the preservation and administration of the assets of said defendant corporation, and in the expeditious and proper handling of the estate,

It Is Therefore Ordered that the Receiver and Thomas W. Nealon, his counsel, are hereby authorized to make such trip for the purposes *and*

aforesaid, and that the said receiver take from the funds in his hands as such receiver the sum of One Thousand ($1000.00) Dollars to pay the expenses of himself, and a like sum to said counsel for said counsel's expenses in connection with said trip, each of them to render an account of such expenses to this Court.

Dated this 30th day of November, 1935.

F. C. JACOBS
Judge.

[Endorsed]: Entered. Filed Dec. 2, 1935. [11]

[Title of District Court and Cause.]

ORDER FOR MONTHLY ALLOWANCE TO H. S. McCLUSKEY AS RECEIVER AND DIRECTING THE PAYMENT THEREOF

Upon Reading and Filing the vertified Petition of H. S. McCluskey, Receiver in the above matter and upon investigation of the facts set up therein and the Court being fully informed in the premises and finding that it is necessary and proper that an allowance should be made to H. S. McCluskey for his services as Receiver in the above entitled cause and that he had devoted practically all of his time to the affairs of said Receivership subsequent to November 11, 1935.

Wherefore, It Is Ordered by the Court that H. S. McCluskey, as Receiver of the above estate, is hereby authorized and directed to pay to himself

for his services as such Receiver, the sum of $500.00 per month on account of fee to be eventually ascertained and fixed by the Court; that he be authorized and directed to immediately pay to himself for his services as such Receiver, from the 11th day of November, 1935, to the first day of January, 1936, at the said monthly rate, and the sum of $500.00 monthly on the first day of each and every month thereafter on account of said fee until further order of this Court.

Dated this 28th day of January, 1936.

F. C. JACOBS
Judge [12]

[Endorsed]: Entered. Filed Jan. 28, 1936. [13]

[Title of District Court and Cause.]

ORDER FOR MONTHLY ALLOWANCE OF ATTORNEY FEES TO ELIZABETH G. MONAGHAN

Upon Reading and Filing the Petition of H. S. McCluskey for the allowance of attorneys fees and due consideration thereof and the Court being fully informed as to the facts in the premises, and it appearing to the Court that this order should be made, and that monthly allowance should be made to Elizabeth G. Monaghan for her services as attorney to the Receiver, and the said services having begun on November 30, 1935, this monthly allowance should begin on the first day of December, 1935.

Wherefore, it is ordered by the Court that H. S. McCluskey as Receiver of the above estate is hereby authorized and directed to pay to said Elizabeth G. Monaghan the sum of $250.00 for her services as such attorney up to the first day of January, 1936, and a like amount on the first day of each and every month thereafter until further orders of this Court.

Dated this 28th day of January, 1936.

F. C. JACOBS
Judge [14]

[Endorsed]: Entered. Filed Jan. 28, 1936. [15]

[Title of District Court and Cause.]

ORDER FOR MONTHLY ALLOWANCE OF ATTORNEY FEES TO THOMAS W. NEALON

Upon Reading and Filing the Petition of H. S. McCluskey for the allowance of attorneys fees and due consideration thereof, and the Court being fully informed as to the facts in the premises, and it appearing to the Court that this should be made, and that monthly allowance should be made to Thomas W. Nealon for his services as attorney to the Receiver, and the said services having begun on November 30, 1935, this monthly allowance should begin on the first day of December, 1935.

Wherefore, it is ordered by the Court that H. S.

McCluskey as Receiver of the above estate is hereby authorized and directed to pay to said Thomas W. Nealon the sum of $300.00 and $159.00 per month for expenses, for his services as such attorney, up to the first day of January, 1936, and a like amount on the first day of each and every month on account thereafter until further orders of this Court.

Dated this 28th day of January, 1936.

F. C. JACOBS

Judge [16]

[Endorsed]: Entered. Filed Jan. 28, 1936. [17]

[Title of District Court and Cause.]

ORDER APPOINTING ADDITIONAL ATTORNEY FOR THE RECEIVER AND NAMING JOHN L. GUST AS SUCH ADDITIONAL ATTORNEY

Upon Consideration of the application of H. S. McCluskey herein for the appointment of additional counsel for him as Receiver in the above entitled suit,

It Is Hereby Ordered that John L. Gust, Esq. is hereby appointed as additional counsel for said H. S. McCluskey, Receiver herein.

Dated this 28 day of January 1936.

F. C. JACOBS

Judge

[Endorsed]: Entered. Filed Jan. 28, 1936. [18]

[Title of District Court and Cause.]

PETITION OF H. S. McCLUSKEY, RECEIVER, FOR THE MAKING OF A MONTHLY ALLOWANCE TO JOHN L. GUST AS ADDITIONAL ATTORNEY FOR RECEIVER

Comes Now H. S. McCluskey, Receiver in the above entitled cause and respectfully represents to the Court the following:

That on the 28th day of January, this Honorable Court upon the application of your Receiver appointed John L. Gust as one of the attorneys to represent him in the above Receiversip.

That the investigation of the affairs of the association made subsequent to his appointment, together with information in his possession beforehand, indicates that the administration of this estate will continue for many months and that it will be necessary to have the services of the attorneys throughout the period of the administration of the estate.

That at all times after the 28 day of January, it will be necessary for the said John L. Gust to devote a great deal of his time to the service of the Receiver in the *the* above entitled matter.

Wherefore your petitioner deems it advisable that this Honorable Court make an order authorizing the payment by him from the funds of said Estate of a monthly allowance to the said John L. Gust on account of the final fee to be allowed him in the premises and that said order show the date of commencing said monthly allowance to be from the 28th day of January, 1936.

Wherefore, *you* petitioner prays that this Honorable Court make an order authorizing and directing him to pay to the said John L. Gust a monthly allowance of such sums as it may deem reasonable for his services, and that such sums be paid on the first day of each and every month until further orders of the Court in reference to this matter.

Dated this 27th day of January, 1936.

H. S. McCLUSKEY
Receiver [19]

State of Arizona
County of Maricopa—ss.

H. S. McCluskey, being first duly sworn, on oath deposes and says:

That he is the Receiver of the Intermountain Building and Loan Association, a corporation, and petitioner above; that he has read the foregoing petition, knows the contents thereof, and that the same is true in substance and in fact.

H. S. McCLUSKEY

Subscribed and sworn to before me this 27th day of January, 1936.

[Seal] C. MERION BERGE
Notary Public

My commission expires: Oct. 4, 1938.

[Endorsed]: Filed Jan. 28, 1936. [20]

[Title of District Court and Cause.]

ORDER FOR MONTHLY ALLOWANCE OF ATTORNEY FEES TO JOHN L. GUST

Upon Reading and Filing the Petition of H. S. McCluskey for the allowance of attorneys fees and due consideration thereof and the Court being fully informed as to the facts in the premises, and it appearing to the Court that this order should be made, and that monthly allowance should be made to John L. Gust for his services as attorney to the Receiver, and the said services having begun on the 28 day of January 1936, this monthly allowance should begin on the first day of February, 1936.

Wherefore, it is ordered by this Court that H. S. McCluskey as Receiver of the above estate is hereby authorized and directed to pay to said John L. Gust the sum of $300.00 for his services as such attorney up to the first day of February, 1936, and an allowance as herein provided on the first day of each and every month thereafter on account until further orders of this Court.

Dated this 28th day of January 1936.

F. C. JACOBS

Judge.

[Endorsed]: Entered. Filed Jan. 28, 1936. [21]

[Title of District Court and Cause.]

PETITION OF CO-RECEIVERS FOR AUTHORITY TO INSTITUTE SUIT IN IDAHO

Now Come Henry S. McCluskey and George A. Mauk, the duly appointed and qualified and acting Co-Receivers of the Intermountain Building and Loan Association, an Utah corporation, and present this petition to the Court, and respectfully represent as follows:

(1) That said defendant corporation owns assets within the State of Idaho of a value in excess of, towit, forty thousand dollars ($40,000.00), exclusive of real property in the state of Idaho; that upon these assets the plaintiffs in the above entitled suit, and others similarly situated, hold an equitable lien, as has heretofore been established by decree of this Honorable Court, which decree has heretofore been affirmed by the United States Circuit Court of Appeals for the Ninth Circuit.

(2) That said property is now in the hands of the Boise Trust Company, a corporation, organized and existing under the laws of the state of Idaho, which corporation is claiming to hold the same under a trust agreement, and free and clear of the rights of the lienholding creditors in the states of [22] Arizona, Oregon, Utah, Wyoming, California, and other states, and they are threatening to distribute such funds to certain favorite creditors, regardless of the rights of your Receivers, the plaintiffs in this action and others similarly situated, who are citizens of the United States and reside in

the hereinbefore mentioned states; that they are threatening to make this distribution in violation of the property rights of said creditors and your receivers as guaranteed by the Constitution of the United States.

(3) That the securities held by the plaintiffs herein, and those similarly situated, are recognized instrumentalities of interstate commerce, within the meaning of the Constitution of the United States, Article 1, Section 8, which provides that the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes, shall be vested in the Congress of the United States, and the various states of the Union are forbidden to lay any burdens upon said interstate commerce, or deprive the owners of any securities negotiated through the usual channels of interstate commerce of any of their rights and privileges, as guaranteed by said Article and Section.

(4) That said Boise Trust Company, a corporation, is threatening to distribute said funds, in violation of the Fourteenth Amendment to the Constitution of the United States, in that plaintiffs are citizens of the United States, and the Constitution and said Fourteenth Amendment thereof provide that no state shall make or enforce any laws which shall abridge the privileges of citizens of the United States, or deprive them of their property, or deny them equal protection of the law.

(5) That by reason of the above mentioned facts, [23] and for the reason that your Receivers are

primary receivers of the Intermountain Building and Loan Association, it is necessary that ancillary receivers be appointed in Idaho for the protection of their property right.

(6) That some of the lienholding creditors of this corporation are about to commence suit in the Federal District Court of the United States, in and for the District of Idaho, for the protection of their rights as described herein; and for the purpose of having ancillary receivers appointed in said Court in aid of the primary receivership pending in this Court.

(7) That your Receivers are advised by their attorneys that it is necessary and advisable for them to join in said suit and become parties thereto.

Wherefore, your *petitions* pray this Court make an order authorizing them to join as plaintiffs in a suit in said United States District Court, in and for the District of Idaho, for the purposes hereinbefore set forth, and to employ Idaho counsel to join with counsel heretofore appointed for your receivers by this Honorable Court to represent them in said suit.

HENRY S. McCLUSKEY
GEORGE A. MAUK
Co-Receivers of Intermountain Building & Loan Association, a corporation,
Petitioners
THOMAS W. NEALON
JOHN L. GUST
E. G. MONAGHAN [24]

State of Arizona
County of Maricopa—ss.

Henry S. McCluskey and George A. Mauk being first duly sworn, on oath depose and say, each for himself and not one for the other:

That he is Co-receiver of the Intermountain Building & Loan Association, a corporation, and petitioner above named; that he has read the above and foregoing Petition of Co-Receivers for Authority to Institute Suit in Idaho, knows the contents thereof, and that the same is true, to the best of his knowledge and belief.

HENRY S. McCLUSKEY
GEORGE A. MAUK

Subscribed and Sworn to before me this 26th day of March, 1936.

[Seal] E. MERION BERGE
Notary Public

My Commission expires: Oct. 4, 1938.

[Endorsed]: Filed Mar. 27, 1936. [25]

[Title of District Court and Cause.]

ORDER AUTHORIZING AND DIRECTING HENRY S. McCLUSKEY and GEORGE A. MAUK, AS CO-RECEIVERS OF INTER-MOUNTAIN BUILDING & LOAN ASSOCIATION, TO JOIN WITH OTHER PLAINTIFFS IN A SUIT IN IDAHO AND EMPLOY IDAHO COUNSEL

Upon Reading and Filing the verified petition of Henry S. McCluskey and George A. Mauk, the duly appointed, qualified and acting Co-receivers of the Intermountain Building & Loan Association, an Utah corporation, praying for an order of this Court authorizing them to join as plaintiffs in a suit in the United States District Court, in and for the District of Idaho, for the purpose of establishing the rights of the plaintiffs in the above entitled cause, and those similarly situated, in and to certain funds of the defendant corporation in Idaho, and for the purpose of applying to the Court for the appointment of ancillary receivers in aid of the primary jurisdiction of this Court in the administration of said receivership estate, and for authority to employ Idaho counsel to join with counsel heretofore appointed by this Court to represent said Co-Receivers [26] in said suit; and

It appearing to the Court from the examination of the verified petition and from the records in this cause that it is proper and necessary for said Co-receivers to join with other plaintiffs in said suit to be filed in Idaho, and that an ancillary admin-

istration in Idaho in aid of the primary receivership in this State is advisable;

It Is Hereby Ordered that Henry S. McCluskey and George A. Mauk, the duly appointed, qualified and acting Co-receivers of the Intermountain Building & Loan Association, an Utah corporation, appointed as such by this Court in the above entitled cause, are hereby authorized to join as plaintiffs in a suit in said United States District Court in and for the District of Idaho, for the purposes set forth in their petition filed in this proceeding, and to employ Idaho counsel to join with counsel heretofore appointed by this Court to represent them in said suit.

Dated at Phoenix, Arizona, this 26th day of March, 1936.

F. C. JACOBS
United States District Judge

[Endorsed]: Entered. Filed Mar. 27, 1936. [27]

In the District Court of the United States
for the Federal District of Arizona

No. E-268 Phoenix

GUADALUPE R. GALLEGOS and FRANCESCA GALLEGOS, his wife; INGA G. GUDMUNDSEN; and MATA E. DEXTER, in their own behalf and in behalf of others similarly situated,

Plaintiffs,

vs.

INTERMOUNTAIN BUILDING & LOAN ASSOCIATION, a corporation,

Defendant.

FINAL REPORT AND ACCOUNT OF HENRY S. McCLUSKEY, AS RECEIVER OF INTERMOUNTAIN BUILDING & LOAN ASSOCIATION, AN UTAH CORPORATION; AND PETITIONS PRAYING FOR THE APPROVAL THEREOF, FOR THE DETERMINATION AND ALLOWANCE OF COMPENSATION TO PETITIONER, FOR FINAL DISCHARGE AND EXONERATION OF BOND, AND FOR THE COURT TO SET A DATE FOR HEARING THEREOF AND TO DETERMINE THE FORM OF NOTICE TO BE GIVEN AND ORDER THEREON

Comes Now Henry S. McCluskey and files, this his Final Report and Account as Receiver of the

Intermountain Building & Loan Association, an Utah corporation, and his petitions praying for the approval thereof, for the determination and allowance of compensation to him, for his final discharge and exoneration of his Receiver's bond, and for the Court to set a date for the hearing thereof and to determine the form of notice to be given and for order thereon; and respectfully represents:

I.

That on the 18th day of April, 1933, a suit was brought on the equity side of the United States District Court for the Federal District of Arizona, in which Guadalupe R. Gallegos and Francesca Gallegos, his wife, Inga G. Gudmundsen and Mata E. Dexter were plaintiffs, and Intermountain Building & Loan Association, a corporation, was defendant, said suit being brought by said plaintiffs in their own behalf and in behalf of all others similarly situated. [28]

II.

That the purpose of said suit was to establish the equitable lien of the plaintiffs, and others similarly situated, upon the assets of the defendant corporation; to prevent waste and dissipation of the assets of said corporation through mismanagement and wrongful conduct of its officers and directors; to have an account taken of the affairs of the defendant corporation; to have a receiver appointed for the defendant with authority to take into his possession all of the assets of said corporation, and all of its books, records and accounts, including choses in action; to continue and operate the business of

the defendant corporation, subject to the orders of the Court; to take charge of all of the real estate of the defendant corporation, keep the same in good condition and repair and collect the rents thereof; that pending the appointment of a receiver a restraining order and injunction issue to prevent any dissipation by the defendant of its assets and the removal or destruction of the books and records of said corporation; that pending a final determination of the suit a temporary receiver be appointed with the hereinbefore mentioned powers, together with all other powers usually conferred upon an equity receiver.

III.

That upon the filing of the complaint herein the United States District Court immediately took jurisdiction and issued a restraining order, restraining the defendant from disposing of the assets of the defendant corporation, and from removing, destroying or concealing its books, records, files, documents and other property of the defendant in the State of Arizona; that process was duly served upon defendant and said defendant corporation subsequently filed its answer in said suit. [29]

IV.

That subsequently your petitioner on the 20th day of April, 1934, was appointed Receiver of said defendant corporation, and on said date duly qualified as such Receiver.

V.

That your petitioner did not obtain the physical possession of the assets of the defendant corporation until on, towit, November 30, 1935, owing to the fact that on the 17th day of March, 1934, J. A. Malia, Bank Commissioner of the State of Utah, had seized the books, records and all of the assets of said corporation, notwithstanding that these assets were then in the constructive possession of this Court, and upon demand of your petitioner, after his appointment as Receiver of said defendant corporation on April 20, 1934, the said J. A. Malia refused to surrender same to your petitioner. At the same time your petitioner also made demand upon the defendant corporation, the Valley Bank of Phoenix, the Home Owners Loan Corporation, the Phoenix National Bank and the State Treasurer of Arizona for the assets of the defendant corporation in their possession, but these demands were not complied with.

That the said Malia and the defendant corporation then filed in the United States District Court on the 21st day of April, 1934, a petition for appeal from the order of this Court appointing your petitioner as Receiver and for supersedeas, which appeal was granted and supersedeas bond fixed in the sum of $35,000.00, which supersedeas bond was given by the said J. A. Malia and said defendant corporation on May 15th, 1934, and thus stayed any further action upon the part of your petitioner until final decision of the case; that the Circuit Court of Appeals affirmed the order of the United

States District Court appointing your petitioner as Receiver, but said Malia and defendant corporation then petitioned the Supreme Court of the United States for a writ of certiorari to review the decree of the said Circuit Court of Appeals, which petition was denied on November 11, 1935 by the United States [30] Supreme Court and mandate duly issued.

That on November 30, 1935, Rulon F. Starley, successor to said J. A. Malia, surrendered to your petitioner the assets shown in the inventory filed by your petitioner in this Court on the 23rd day of July, 1936, and on or about said date the assets in the possession of the Valley Bank of Phoenix, the Phoenix National Bank and the State Treasurer of Arizona were surrendered to your petitioner. That he administered said receivership estate thereafter, making such conversions and disposition of the assets of the receivership estate as was required by the various orders made by the United States District Court of Arizona in the premises.

VI.

That on the 8th day of February, 1936, after due notice the District Court of the United States in and for the District of Arizona made the appointment of your petitioner as Receiver of the defendant corporation permanent.

VII.

That the said assets of the defendant corporation situated in the state of Arizona coming into the

physical possession of your petitioner as Receiver of the defendant corporation, as shown in their present form on Exhibit No. I hereto attached and by reference made a part hereof, after allowing for possible losses thereon, are valued by your petitioner in the sum of $1,349,613.35, and the assets owned by the defendant corporation situated outside of the state of Arizona coming into the constructive possession of your petitioner, are valued by your petitioner in the amount of $770,049.47, as shown on Exhibit No. II hereto attached and by reference made a part hereof, making a total valuation of the assets of the [31] defendant corporation in the sum of $2,119,662.82.

VIII.

That at the time your petitioner took over possession of the assets and records of the defendant corporation he found that there was no inventory showing such assets, and that no inventory had been made by J. A. Malia, Bank Commissioner of the state of Utah, when he took possession on March 17, 1934, or by Rulon F. Starley when he took over possession from said J. A. Malia.

IX.

That on or about the 8th day of February, 1936, the United States District Court in and for the District of Arizona appointed G. A. Mauk as co-receiver with your petitioner; that said G. A. Mauk served in that capacity to the 11th day of May, 1936; that he resigned as such co-receiver and made

his report which was approved by the Court and he was discharged and his bond exonerated.

That subsequent to said time and up to the 1st day of April, 1937, your petitioner served as the sole receiver of the receivership estate of said insolvent corporation, and during all of said time had the sole custody and control of the assets of said defendant corporation situated in the state of Arizona.

X.

That your petitioner found that the records of the corporation did not truly state the amount that was owed to the corporation by persons who had given their promissory notes to the corporation, these promissory notes being secured by mortgages on real property situated in Arizona and in other states and foreign countries; that without authority of law whatsoever [32] the defendant corporation had charged upon its books against the makers of these promissory notes and mortgages fines and penalties when they failed promptly to pay the installments due to the defendant corporation upon such promissory notes and mortgages, these promissory notes and mortgages being payable monthly, the payments of both interest and principal being over long periods of time, towit 8½ years. The defendant corporation also charged, without authority of law, to these persons who had borrowed money from it a certain sum per month for dues. The defendant corporation thus loaded the accounts of the makers of these promissory notes with charges, penalties and fines for which there was no

justification whatsoever, and the defendant corporation thus set up in its records fictitious and an excessive amount as assets of said corporation.

Said defendant corporation also calculated and placed upon its records charges of interest in excess of the amount permitted by statute and in excess of the amount of their contracts with the makers of said promissory notes and mortgages, and the interest was figured upon a usurious basis. Not only did they set up this usurious interest as to the amount of the loans in question, but they calculated this interest upon fines, dues and penalties which they had charged upon their records to the borrowers without any authority of law therefor.

As a result of such erroneous statements of the amounts due the corporation from the makers of these notes and mortgages, these records in the condition they were in at the time that your petitioner took possession thereof could not be used as evidence in courts where it was necessary to file suits for the collection of such promissory notes and the foreclosure of such mortgages. Had your petitioner attempted to produce these records in court in suits against the makers of said [33] promissory notes and mortgages as evidence of the amount due thereon, the makers of said notes and mortgages would have been entitled to plead usury as a defense, and as such a defense, if sustained, would have meant a loss of all interest upon the loans made by the corporation to such persons, and the result would have been a loss of an immense amount

of money to the creditors of said Association, as the interest in some of these cases extended over a period of more than 8½ years. And in such instances the Receiver would only have been able to collect upon such promissory notes and mortgages, the balance due upon the principal thereof after crediting to the principal of the notes all sums paid thereon, whether paid on principal or interest, under provisions of Section 1885, Revised Code of Arizona, 1928, and the statutory laws as it existed prior to the enactment of said Code. That when your petitioner threatened foreclosure of some of the promissory notes secured by said mortgages, attorneys representing the makers of such notes and mortgages, laid the foundation for such defense in said suits by an examination of the records of this corporation with a view to establishing such defense.

That in some instances your petitioner deemed it advisable to present the question to the judge of the United States District Court with a view to compromising the most dangerous of these suits, and under orders of this Court, after a frank and full disclosure of the situation was made to the Court, orders were made by this Court authorizing your petitioner to make compromises in a number of instances, and such compromises were made with great benefit to the receivership estate. A great deal of your petitioner's time was consumed in interviews with various debtors of the corporation and with attorneys for the mortgagors and furnishing them with information, all of which presented

problems of grave importance to the receivership estate.

XI.

That because of the aforesaid condition of the [34] records of the defendant corporation, it became necessary for your petitioner to employ a certified public accountant whose testimony would carry weight in any court to audit and refigure these accounts and set up an inventory. That the corrected figures as found by said certified public accountant were set up upon the books of the Receiver and the figures and accounts as so set up were used as the basis of the inventory filed by Harry W. Hill, Esq., as Receiver in this proceeding. That this entailed an extraordinary expense upon the estate of $4,-821.34 for the services of said certified public accountant and for the corps of assistants employed by him in order to have this work done expeditiously and not delay the administration of the estate or the collection of such assets, as well as to lay the foundation for the recovery of assets in states other than Arizona.

That said certified public accountant was appointed and this expense incurred after conference with the Judge of this Court and bills for the services rendered were from time to time presented to said Court and orders duly made allowing same and directing the payment thereof.

XII.

That the records of this corporation of its accounts with the plaintiffs, and others similarly situ-

ated, had been kept upon the same erroneous and fictitious basis as were the accounts with the makers of the promissory notes and mortgages hereinbefore described. These persons were creditors of said corporation holding equitable liens upon the assets thereof, as has been judicially determined, not only by the United States District Court in and for the District of Arizona, but by the United States Circuit Court of Appeals for the Ninth Circuit, and in effect by the Supreme Court of the United States upon a [35] hearing on certiorari herein referred to. It therefore was necessary to have all of these accounts of the creditors of said Association audited, refigured and correctly stated and segregated into their several classes and series—of which there were approximately 35 classes—in order that the indebtedness of the corporation to these security holders could be determined by this court when the claims, which this Court has authorized to be filed in this proceeding, would be presented to this Court for final adjudication and declaration of dividends to the holders of said claims.

That there are approximately 4800 creditors of the Association holding such claims; that there have been filed with your petitioner as Receiver pursuant to the orders of this Court directing the filing of such claims, 2,729 prior to February 22, 1937, which was the final date fixed by the Court for the filing of such claims; that subsequently thereto and prior to the 1st day of April, 1937, 63 additional claims were filed in this proceeding making a total of 2,792 claims filed.

That these 4800 claimants were scattered over many states of the Union and in foreign countries, and had been making monthly payments to the defendant corporation for many months and prior to the taking over of the assets of the corporation by your petitioner and in some instances these payments have extended over a period of ten years or more.

That the examination and correction of the records pertaining to these 4800 claimants and of the 2792 who had filed claims entailed an immense amount of detail work upon the clerical force under the direction of your petitioner, including the correct setting up of such claims upon the records of the corporation, the sending out of notices by mail to each of the creditors of the Association who appeared upon the records of the corporation, the furnishing of blanks for the filing of said claims, [36] the furnishing of information to said claimants, and the checking and comparing of the claims with the record in order that the claims might be correctly filled in and intelligibly presented to this Court for the purpose of determining the legality of said claims, or so many of them as might be presented in this proceeding. This necessarily entailed a heavy expense upon the receivership estate, but fairness to these creditors required the sending of these notices, furnishing of blanks and furnishing information. That in pursuance of this policy, and in order that no creditor's rights might be imperilled, your petitioner sent four separate

notices to all of the claimants of said Association of which he had knowledge, and accompanying two of these notices were forms for the filing of these claims with detailed instructions in regard to their preparation. In this connection see Exhibit IV hereto attached and made a part hereof.

That conditions in the various states outside of Arizona, the conflicting claims asserted by state officials in Oregon, California and elsewhere and conflicting notices sent out by these state officials, and the decision of the State Superior Court of California giving preference to residents of that state, were confusing to the claimants and made it impossible for them to protect their rights without calling upon your petitioner for such information as was in his possession. This entailed studies of their individual accounts and the writing of hundreds of letters to these claimants explaining the tangled situation, in addition to sending many form letters. (See Exhibit IV hereto attached.)

In addition to this there was a great deal of correspondence with claimants who had lost their "certificates" and did not know how to make claim in the absence thereof. There was also a great deal of correspondence with claimants whose claims were based upon assignments of certificates from the original holders thereof, and in many instances by [37] certificate holders who had made assignments of their certificates to third persons who had filed claims and who claimed that the assignments were made through fraudulent representations. Also many deaths occurred among the holders of these

claims during the period subsequent to 1921 and the persons to file claims as successors of the original claimants did not possess sufficient legal knowledge to determine by whom and in what manner such claims should be filed. In many instances claims that were filed had to be returned to claimants for correction or amplification. Many other problems of like or similar nature were presented to your petitioner in connection with these claims.

In addition the time of your petitioner and his office staff were taken up daily with interviews with claimants who came in person to seek information, many of them from long distances and from other states, and there were many interviews with attorneys representing creditors, many of whom asserted special rights and preferences in the premises.

XIII.

The condition of much of the real property taken into the possession of your petitioner on, towit, November 30, 1935, was deplorable. In almost all instances the property had been neglected, repairs had not been kept up and the physical condition thereof had been allowed to deteriorate to the point where in order to make the property of the receivership estate income paying and avoid further depreciation, it became necessary for your petitioner to undertake a constructive course of rehabilitation of such properties.

The bad condition of these properties was due in

great measure to the fact that the defendant corporation had allowed mortgagors to remain in possession after the mortgages had become [38] hopelessly delinquent, and these mortgagors had no further interest in keeping the property in good repair. The houses upon many of these properties had been built for many years.

The defendant corporation and its officers had not exercised due care in the selection of persons to whom it made loans upon mortgages. Many of the mortgages were apparently made with the idea of laying a foundation for the selling of securities in the communities in which loans were made, such sales of securities being for the profit of the officers and directors of the defendant corporation.

In many instances loans had been made in mining towns and in other communities where the properties were not worth anything like the amount of the mortgage indebtedness against them. Typical of these towns in Miami. In these cases compromises and settlements were made upon presentation of the facts and surrounding circumstances to the Court by means of petition. Where the amount justified it, appraisals were had. These conditions were so notorious that the matters involved were matters of common knowledge, of which the Court could take judicial notice. Renewal of mining activities have improved these conditions somewhat in recent months.

There were other instances where loans were so excessive as to clearly indicate fraud in their in-

ception. Houses were built by the Lincoln Mortgage Company, a corporation closely affiliated with the president of the defendant corporation and the buildings were not worth anywhere like the amount loaned upon the premises and were built where the locations were such that good judgment would have required that the loans should be declined. Typical of these is the case of the loan upon the hotel situated on the desert at Wellton which required emergency expenditures in order to save even a remnant of the amount due for the estate. In the settlement made with the mortgagor in the premises your [39] petitioner secured the furniture and furnishings of the hotel in order that some rents might be obtained therefrom and that the property might not deteriorate and be destroyed during the period it was lying idle before a purchaser could be had. This property is now in the possession of Harry W. Hill, Esq., Receiver.

The nature and character of the properties were diverse and varied, and included therein were residences, duplexes, apartment houses, hotels, a golf course, vacant lots, garages, auto courts, adobe shacks, storebuildings, etc.

XIV.

That a deplorable condition also existed in regard to properties upon which the defendant corporation held hopelessly delinquent mortgages and where no steps had been taken to obtain the income from the property during delinquency, and these also entailed an expense for rehabilitation; that in

numerous instances your petitioner secured assignments of rents from the mortgagors, together with the physical possession of the property, and in other instances where such assignments could not be obtained, he secured the appointment from the State Courts of receivers for the particular property. In these instances your petitioner secured the appointment of C. M. Berge or Millard Elam, each of whom were employees of your petitioner and no additional charge was placed upon the receivership estate by reason of such appointment. The rents were thus conserved and preserved for the benefit of the receivership estate, and the properties were placed in good condition and further deterioration avoided.

XV.

There were also items of real estate where the mortgagors had abandoned the property and left the jurisdiction of this Court and of the courts of Arizona. In those instances it was necessary to institute foreclosure proceedings and take [40] steps to secure possession of the property in order to perfect the title for the benefit of the receivership estate, and it was also necessary to rehabilitate these properties so that a rental income might be preserved for the receivership estate.

XVI.

In some instances there were recalcitrant mortgagors who refused to make any payments on their delinquent indebtedness, and it was necessary for

your petitioner to take stern measures in order to collect such delinquent indebtedness and to protect the estate in the premises. In some cases it was necessary to bring forcible detainer actions in order to recover possession of the properties.

XVII.

The items of rehabilitation included work upon wells, water systems, cess pools, repainting, plumbing, decorating, repairing roofs, etc. Other expenses of rehabilitation were made necessary by fires occuring during the administration of your petitioner, the damages for which were recovered from insurance companies and placed to the credit of the receivership estate.

The properties were scattered over many portions of Arizona, making the work time consuming and difficult, and necessarily increased the expense.

In order to make certain of these properties available for rental and sale purposes, it was necessary to secure extensions of gas and water mains and advance the moneys required therefor. In each of these cases the facts were presented to the Court by means of appropriate petitions and upon due consideration by the Court, orders were made authorizing these expenditures by your petitioner.[41]

XVIII.

That in Exhibit No. III hereto attached and by reference made a part hereof, is set forth a somewhat detailed account of the rehabilitation expenses

so incurred. That all expenditures under $100 were made pursuant to the general order of this Court, and all expenditures in excess of $100 were made upon special orders of this Court after hearing on petitions setting forth the necessity for the expenditures. In a few instances where emergencies arose requiring immediate action, the facts were immediately reported to the Court by petitions, and orders were made by the Court ratifying the action of your petitioner. That by reason of the systematic course of rehabilitation pursued by your petitioner the income of the receivership estate was greatly augmented and the various properties placed in a condition where they could be converted into cash assets.

XIX.

That the defendant corporation had during a period covering several years allowed delinquent mortgagors to remain in possession of the mortgaged properties without paying either insurance or taxes thereon, and these mortgagors made no payments either upon the principal or interest of the mortgages. The defendant corporation had paid the insurance upon these properties that should have been paid by the mortgagors, adding the same to the mortgage indebtedness. Taxes were allowed to become delinquent and to accumulate over long periods of time. This necessitated a large outlay upon the part of your petitioner to save such properties from sales for taxes and to redeem properties where through the neglect of the

defendant corporation and the mortgagors they had been sold for taxes.

A further outlay for taxes was necessary by reason of the statutes of Arizona which required the payment of taxes by the mortgagee in all foreclosure proceedings. [42]

That in almost all instances where the mortgages were delinquent, the mortgagors had failed to pay their personal property taxes and the same had been charged against their real property. This necessitated further action upon the part of your petitioner to have such charges either paid or set aside. In many cases he met with opposition at the hands of local tax officers and the county attorneys of various counties where such properties were located. In some cases the taxes on this personal property had to be paid under protest by your petitioner and suits instituted to recover the same from tax officials.

XX.

That your petitioner made a survey of all of the insured properties in order to ascertain that all the properties coming into his possession were properly covered by insurance. This survey developed that the defendant corporation had been paying premiums on excessive insurance which would have been uncollectible in case of fire. This useless expense was immediately cut off by your petitioner upon the development of the facts through the surveys made.

XXI.

That prior to the time your petitioner obtained physical possession of the assets of said defendant corporation many applications had been made to the Home Owners Loan Corporation by mortgagors for loans to refinance their indebtedness to the defendant corporation. That owing to the fact that an appeal was taken from the order appointing your petitioner as Receiver of said corporation, by the defendant corporation and by J. A. Malia, Bank Commissioner of the State of Utah, and supersedeas bond entered staying further action upon the part of your petitioner as such Receiver, there was no one who had legal authority to release the mortgages of the defendant corporation, and as a consequence thereof the applications of these [43] mortgagors to the Home Owners Loan Corporation were rejected. Subsequently the Home Owners Loan Corporation granted certain privileges to those who had applied for such loans and whose applications had been rejected, but the conditions placed upon such loans were more onerous than those theretofore existing and many loans that were eligible for refinancing at the time your petitioner was appointed Receiver, were not eligible at the time he obtained possession of the assets of said defendant corporation.

That there was, however, a situation created by which many of the loans could be refinanced through the Home Owners Loan Corporation within a limited time after your petitioner had obtained possession, and in order to obtain this advantage for

the receivership estate and to afford equitable relief to numerous mortgagors who were bitterly complaining to the Court and to your petitioner of the injustice that they had suffered through no fault of their own, your petitioner, after a conference with the Judge of this Court, employed Evan S. Stallcup to handle this situation and to conduct negotiations for this purpose with both the mortgagors and the Home Owners Loan Corporation. That Mr. Stallcup was selected for this purpose because he had previously been the Assistant State Manager for the Home Owners Loan Corporation in Arizona and was thoroughly familiar with the law and practice of the department in handling these loans, was also a member of the bar of the State of Arizona, and a recognized authority in real estate title matters. That Mr. Stallcup was employed by your petitioner for a period of slightly in excess of four months time at a salary of $400 per month, and he was paid the sum of $1662.60.

Mr. Stallcup rendered valuable and efficient services in the premises and by and through his aid and efforts forty [44] of these mortgages and two properties which had been foreclosed upon, were converted and refinanced through the Home Owners Loan Corporation, and through these proceedings the sum of $60,518.57 was realized in cash and bonds, and a further sum of $6,739.16 in other securities, as salvage, making a total recovery on said mortgages of $67,257.73, representing the full appraised value thereof, and 80.25 percent of the principal due upon said mortgages, and in addition

thereto assignments of seven certificates of this and other Associations were taken to apply on the notes taken as salvage and as additional salvage, the value of which cannot be determined; that a detailed account and report of these transactions have been heretofore filed with this Court, and are also shown on Exhibit No. V hereto attached.

Mr. Stallcup also rendered valuable services and assistance in working out problems connected with refinancing mortgages through the Home Owners Loan Corporation in states other than Arizona.

The payment to Mr. Stallcup, due to the exigencies of the situation, but beneficial to the estate, was an extraordinary expense of the administration that it would not have been necessary to incur if the defendant corporation and J. A. Malia, Bank Commissioner of Utah, and his successor, Rulon F. Starley, had not appealed from the order of this Court appointing your petitioner as Receiver to the Circuit Court of Appeals and on certiorari to the Supreme Court of the United States, thus delaying the administration of this estate for a period of more than nineteen months.

XXII.

That upon taking over the physical possession of the assets of the corporation, it was imperative that your petitioner make an immediate investigation of the condition of the properties of the defendant corporation in states other than Arizona, by reason of the obligations placed upon him as [45] primary receiver by the statutes of the United

States which imposed certain duties and responsibilities upon him. Representatives of the Home Owners Loan Corporation also called upon your petitioner and his attorney, and recognizing your petitioner as the primary receiver, explained that many mortgagors whose notes and mortgages were held by your petitioner and by state officials in the other states were clamoring for relief under the H. O. L. C. act and asked your petitioner to take such steps in these various states as would facilitate the handling of H. O. L. C. loans within the five months still left for closing such loans. Also the assets in the states covering Idaho, Wyoming, California, Utah and Oregon had an aggregate value, as elsewhere shown in this petition, of not less than $724,881.83, which the creditors of the defendant corporation were entitled to share, and share alike.

Your petitioner made a complete explanation of this situation to the Judge of the United States District Court in charge of this matter and on December 2, 1935, an order was made instructing and directing your petitioner to visit the said states and take such steps as might be necessary in the premises and to have Thomas W. Nealon accompany him as legal advisor.

That your petitioner thereupon immediately went to Salt Lake City, accompanied by Thomas W. Nealon, and had a conference with the representatives of the Bank Commissioner of Utah and his attorneys, with the idea of making arrangements for the appointment of an ancillary receiver in

Utah and a harmonious handling of the assets of the corporation in that state, and for the sending of notes and mortgages held by your petitioner to that state for collection.

After this conference, and before any decision was made in the premises, your petitioner, accompanied by his attorney, [46] visited Cheyenne, and while there procured the appointment of ancillary receivers in aid of the administration in the state of Wyoming, one of whom was your petitioner and the other being John T. Boyd of Cheyenne, Wyoming. This appointment was made by the United States District Court in and for the District of Wyoming.

After completing the business in Wyoming, your petitioner returned to Salt Lake City, Utah, for further negotiations with Rulon F. Starley, Bank Commissioner of Utah, who then had in his possession assets of the corporation in Utah, and other state officials. No final arrangements were made at that time. (Some time later Thomas W. Nealon made two visits to Salt Lake City and in co-operation with certain creditors secured an ancillary administration in Utah, James L. White being appointed ancillary receiver by the District Court of the Third Judicial District in and for Salt Lake County, Utah, the United States court having refused to take any action in the premises.

Your petitioner then went to Idaho and secured the appointment of ancillary receivers in that state in aid of the administration in Arizona, one of whom is your petitioner and the other Charles A. McLean, of Boise, Idaho.

Your petitioner then continued his trip to the state of Oregon where he and his attorney, Thomas W. Nealon, made attempts to secure a peaceful arrangement for the appointment of ancillary receivers in that state. Your petitioner was not successful and subsequently under instructions of the United States District Court in and for the District of Arizona instituted proceedings in Oregon to secure such anicillary administration in aid of the Arizona receivership. The contention was made in the state of Oregon that the Oregon creditors had preferential rights in the premises.

(Subsequently, during the month of January, 1937, your [47] petitioner, accompanied by one of his attorneys, Thomas W. Nealon, and James A. Smith, C. P. A. and C. M. Berge, local accountant in the Phoenix office, as witnesses, under order of this Court, went to Portland, Oregon for a hearing before a special master appointed by the United States District Court to take evidence in the premises and make a report thereon. As this hearing was a part of the proceedings involving assets of more than $300,000.00 in which Arizona creditors of the defendant corporation, as well as those situated in other states, were entitled to participate in under the rule laid down by the Supreme Court of the United States, it was important that this suit and subsequent proceedings be taken. This case had not been determined by the Oregon court when your petitioner turned over the affairs of the defendant corporation to Harry W. Hill on April 1, 1937.

From Portland, Oregon, your petitioner then went to San Francisco and Los Angeles, California, and there endeavored to make friendly arrangements with the Building and Loan Commissioner of California, but in this was not successful, and it became necessary, with the approval of this Court, to institute a suit in California for the appointment of ancillary receivers there and for the recovery of assets that had been transferred to California after the corporation was hopelessly insolvent. In this connection it is to be borne in mind that a state Superior Court of California had in a proceedings instituted by Louis C. Drapeau, as Building and Loan Commissioner of California, decreed that certain classes of creditors who were residents of California at the time insolvency proceedings were instituted therein were entitled to be paid in full out of the assets of the corporation in California, regardless of the rights of creditors in other states. As this involved over $100,000.00 in assets properly applicable for the payment of dividends to the creditors of the defendant corporation [48] in Arizona and elsewhere, it was imperative that this action should be taken. The suit instituted by your petitioner had not been determined on the 1st day of April, 1937.

XXIII.

During the aforesaid trip your petitioner as far as possible examined general conditions pertaining to the properties of the defendant corporation situated in the several states. The condition

surrounding the properties were not materially different from those existing in Arizona. Your petitioner also conferred with H. O. L. C. and state officials, attorneys for mortgagors, and title and trust officers in an endeavor to expedite liquidation of the estate.

XXIV.

The result of the trip so made to these various states was of great benefit to the receivership estate by reason of the appointment of these various ancillary receivers and the conservation of the assets under the direction of the courts in Wyoming, Idaho and Utah. The securing of the appointment of a receiver in the state of Utah was particularly important for several reasons, among others, because that was the state in which the defendant corporation had been incorporated and its affairs were in charge of Rulon F. Starley, successor in office to J. A. Malia, and were not being administered in harmony with the administration in this state. A large portion of the assets of the corporation were situated in the state of Utah and consisted of real property in possession of the Bank Commissioner of Utah as aforesaid. Another reason why it was particularly important to have a receiver appointed there, was that a large number of promissory notes (negotiable instruments) were in the actual physical possession of your petitioner as Receiver. These promissory notes were secured by mortgages upon real property situated in [49] the state of Utah. It was therefore necessary for

the best interest of the receivership estate that the affairs of the defendant corporation in Utah should be under the control of some court that would protect the rights of the general creditors of the receivership estate. The situation in Utah prior to the appointment of an ancillary receiver was such as to threaten conflicting litigation between state officials and your receiver that would injuriously affect the creditors of the corporation wherever situated.

XXV.

Many problems faced your petitioner during the period following his appointment as Receiver, but before he obtained possession of the assets of the corporation, the mortgagors in the various states were clamoring for his assistance in securing H. O. L. C. loans and in obtaining releases of mortgages. In the early part of this litigation the Home Owners Loan Corporation gave some recognition to the state officials, but as the litigation progressed became convinced that it was not safe to accept releases of these mortgages from such officials. As a result attorneys representing the Home Owners Loan Corporation in these various states called upon your petitioner frequently and consumed a great deal of his time.

XXVI.

Another problem that faced your petitioner during the period when this case was under appeal, was the dilemma in which mortgagors were placed as to whom they should make payments upon their

mortgages. They did not want to pay them to the officials in the various states, or to the defendant corporation, and be faced with the possibility of again being called upon to pay the same sums to your petitioner as Receiver. An important part of your petitioner's duty prior to the time when the final ruling [50] was made by the Supreme Court of the United States was to take as effective measures as possible to preserve the property of the defendant corporation until the litigation was finally determined. The handling of this proposition required a great deal of your petitioner's time.

While your petitioner endeavored to co-operate with officials in possession of its assets during this time and to work out stipulations for the handling of the estate, he did not get co-operation in return. They refused to recognize your petitioner as Receiver of the defendant corporation and this produced an awkward situation and a problem for your petitioner. In a number of these states there was opposition to your petitioner and to some extent a combination of state officers in various states to thwart this Court in the measures it was taking to protect the creditors of the defendant corporation.

Also during said time your petitioner had many conferences with mortgagors and their attorneys, and with officials and attorneys of the Home Owners Loan Corporation, and with attorneys for the defendant corporation and J. A. Malia, and with the attorneys for the plaintiffs; that with the consent of the attorneys for the plaintiffs, your peti-

tioner offered to stipulate with the defendant corporation and J. A. Malia to such action in the premises as would have allowed the refunding of mortgages through the Home Owners Loan Corporation, but said defendant corporation and J. A. Malia refused to recognize any, not even a qualified right to the possession of your petitioner in said assets, or to take any action in the premises; that by such action your petitioner was greatly hampered in the proper administration of said receivership estate.

XXVII.

That during the period of more than nineteen months immediately preceding the date upon which your petitioner [51] obtained possession of the assets of the corporation as hereinbefore set forth, the property of the receivership estate was constantly depreciating in value, as repairs were not being kept up and many mortgagors retained the mortgaged property without taking any care of same and without paying insurance, taxes, interest, or payments on principal.

XXVIII.

That during the pendency of the appeal of this case and prior to the time when your petitioner obtained physical possession of the assets of the defendant corporation, various actions were instituted and other proceedings had by creditors seeking to obtain an advantage for themselves over others similarly situated by litigation in the state court.

One of these suits was brought by Mathilda J. Foerst in the Superior Court of Maricopa County, Arizona, in which she first obtained a declaratory judgment for the amount of her claim, and then acting upon this judgment and a subsequent judgment, instituted garnishment proceedings against the funds of the defendant corporation deposited with the Valley National Bank of Phoenix. Your petitioner studied this case, conferred with the attorneys, and immediately upon the mandate of the Appellate Court being filed and his taking over physical possession of the assets, made his appearance in said last named suit and obtained an order quashing the garnishment proceedings. From this order the said Matilda J. Foerst appealed to the Supreme Court of the state of Arizona, and in said litigation your petitioner was again successful and obtained a very far reaching decision establishing the rights of your petitioner as Receiver, and that decision will be decisive in other litigation affecting the rights of the creditors of this corporation and the receivership estate.

Also prior to the time when your petitioner obtained [52] possession of the assets of said corporation as aforesaid, action was started against the defendant corporation in the Superior Court of Yavapai County and attachment was issued therein and sale of a mortgage was made. This involved an amount in excess of $3,000.00. Your petitioner studied the case and conferred with the several attorneys, and immediately took the necessary steps in said litigation to preserve the rights of the re-

ceivership estate, and while this litigation has not been settled, the principles necessary to be established for the protection of the receivership estate were established in the Foerst case hereinbefore mentioned.

In addition sales had been made by the defendant corporation and by Malia prior to the time that your petitioner went into possession, and it was necessary for your petitioner to take proper steps in court for the protection of the assets of the corporation against such claims which were unfair and inequitable in their nature. Three of these matters were pending before this Honorable Court at the time your petitioner ceased to be Receiver. Your petitioner regards all the issues therein settled by the decision of the Supreme Court of Arizona in the said Foerst case, as well as by prior decisions of the Supreme Court of the United States, cited with approval by the Supreme Court of Arizona in the Foerst case.

XXIX.

The problems which faced your petitioner as Primary Receiver of the defendant corporation in the various states in which that corporation owned property were numerous and complicated. The facts and circumstances which made this burden onerous were as follows:

The Constitution of the United States provides, and the Supreme Court of the United States in its decisions, has recognized the fact that creditors similarly situated to those of [53] *of* the plaintiffs

herein have the same rights in all of the states of the Union, and that no state can by statute create a preference in favor of its own citizens over citizens and non-residents of other states of the Union. (The Supreme Court of the United States has recognized the right of a state to require of a foreign corporation as a condition precedent to doing business in the state, a deposit of funds for the protection of the citizens of that state doing business with such foreign corporation.) Your petitioner is advised, and believes, that the rights of the creditors of this corporation are the same as to all the properties in the various states in which it did business, regardless of where the creditors may be situated. Most of the laws affecting building and loan associations in which it is attempted to give preference to residents of certain states have been enacted in the last six or seven years and subsequent to sale of the certificates involved, and state officials in these various states have endeavored to have these laws construed as being retroactive. The Congress of the United States appears to recognize the right of that court which first assumes jurisdiction over a delinquent corporation to appoint the primary receiver, and under the provisions of Title 28, Ch. 18, Secs. 847, 848 and 849, United States Code Ann., as amended by the Act of 1935, placed upon the primary receiver duties in regard to the sale of the properties in all of the various states.

In this particular case the suit was first instituted in this Court for the enforcement of the

rights of these creditors as against a delinquent trustee which had been unfaithful to its trust and the rights of such creditors necessarily reverted back at least to the date upon which this suit was filed.

Your petitioner being the Primary Receiver of the defendant corporation, and so recognized by said statutes of the [54] United States, became vested with the legal title of all of said properties by virute thereof and of the final decree rendered in this Court on towit, January 5, 1937, which decree in compliance with the usual proceedings in equity provided that all of the properties of the trust estate involved in this proceeding (which included all of the assets of the defendant corporation wherever situated) should be by good and sufficient conveyance transferred to your petitioner in trust for the plaintiffs in this suit and others similarly situated.

A heavy responsibility was thus placed upon your petitioner in regard to the handling of the property in the various states, and his management of the same was further complicated by the statutes of these various states in regard to building and loan associations, real estate conveyances, titles and other matters that had to be considered in enforcing the rights of the creditors.

Before any dividends could be declared or paid to creditors of the defendant corporation in this proceeding, it was and is necessary to find the exact proportion to which creditors in each of

these states are entitled. This could only be ascertained by the decisions of the courts of such states in suits pending therein to determine the question of preferences. The interests of the creditors of the defendant corporation in a proper determination of these issues is so great that all possible steps were taken by your petitioner for the protection of the receivership estate in such suits.

XXX.

Another problem that caused a great deal of anxiety to your petitioner was that growing out of the situation in Utah. The judge of the United States District Court announced that he would not appoint any ancillary receiver in that state. [55] Ancillary proceedings were therefore brought in the state court and James L. White was appointed ancillary receiver. He took the position that he had a right to make offsets and trades with debtors of the corporation and allow debtors to purchase claims of creditors, even subsequent to the appointment of a Receiver, and apply such purchased claims against the amount of their indebtedness to the defendant corporation and receivership estate. Your petitioner would not countenance any such proceedings for the reason that such preceedings would leave the door open for fraud; many people would purchase at a discount claims against the corporation for the purpose of offsetting them as against the mortgage indebtedness due the corporation. Moreover the attitude of the ancillary receiver in Utah resulted in propaganda among the

creditors of the corporation to the effect that they had better accept 5 or 10 cents on the dollar for their claims rather than trust to this Court doing justice in the premises. A similar propaganda was instituted in Arizona and some creditors were fraudulently induced to part with their claims as a result thereof.

The ancillary receiver in Utah also refused to press suits against the directors of the corporation resident in Utah, against whom your petitioner believed there existed valid claims in excess of $100,000.00. Your petitioner was advised and believes that these directors are solvent, and although your petitioner through his attorneys furnished the ancillary receiver in Utah with a form of complaint and full information as to evidence existing, sufficient in the opinion of your receiver and his attorneys, to justify a judgment in favor of said ancillary receiver, said ancillary receiver refused to take any action in the premises. [56]

XXXI.

A great deal of labor was also entailed upon your petitioner in regard to the titles of lands in the various states, conflicting descriptions, questions growing out of tax sales, and also questions growing out of insurance and fires. The problems were further complicated by emergency laws in the states, and particularly by moratorium acts, as well as by statutes carrying a penalty upon a refusal to release mortgages when paid. Further problems arose out of properties located in irrigation districts in the various states.

XXXII.

A very complicated situation existed in Canada. That country had enacted moratorium laws which went far beyond anything that we had in the United States and rendered collections almost impossible, and greatly depreciated the value of the securities existing in that country. The situation in Canada was further complicated by the fact that a Canadian corporation had been formed to handle the business in Canada and this corporation had sold the major portion of its accounts to the Canadian corporation. The situation was again complicated by the difficulties arising from defaulting officers and agents of the corporation who had been in charge of the business in Canada.

XXXIII.

The great problem was to salvage the assets in these various states for the benefit of the creditors of the corporation. A great deal of your petitioner's time was consumed with these problems, as they were presented to your petitioner by officers and their attorneys from the various states in which the properties were situated, and by mortgagors and creditors and their attorneys. Also receivers, or their attorneys from all of the states, except Idaho, visited your [57] petitioner at Phoenix to inspect the records and confer with him concerning the assets in their respective jurisdictions.

XXXIV.

That in the inventory filed in this Court prepared by James A. Smith, C.P.A. there appears a detailed

statement of the various properties and securities that came into the possession of your petitioner. That said inventory was compiled from the records of the corporation and show assets as they appeared on the books of the corporation as of November 30, 1935. They do not represent the actual state of the accounts for the reason that there had been charged therein by the corporation as against the borrowers, usurious interest, fines and penalties not authorized by law, and as against the accounts of the creditors of the corporation, there was also charged fines and penalties not authorized by law, as hereinbefore set forth. In setting up the accounts owned by the corporation no attempt was made to give the actual value, but only such as appeared on the records of the corporation, and these entries apparently represented no actual value but costs to the corporation, including taxes, insurances and expenses of litigation. The inventory does not purport to show the legal status of the securities or the accuracy of the individual accounts as carried on the books of the corporation. The use of the term "book value" in this report and in the exhibits hereto attached represent the figures as they appear upon the records of the corporation and are not to be construed as fixing the real or true value of the items.

XXXV.

That Exhibit No. I hereto attached shows the assets of the defendant corporation in the state of Arizona in possession of your petitioner in the form

as they existed on April 1, 1937. That during the period of your petitioner's administration as receiver, there has been added to the various accounts and [58] *and* notes receivable as set up on the books of the corporation, additional amounts covering interest, insurances, taxes and other proper charges, and there has also been deducted therefrom usurious charges made to these accounts by the defendant corporation prior to receivership. These assets are shown on Exhibit No. I as they appeared on April 1, 1937, in the amount of $1,597,841.89.

From the total of said assets as shown on said Exhibit No. I, we have made a deduction of $248,-228.54 for possible losses that may occur upon realization thereof during the course of the receivership administration. The deductions made on the assets where the securities are within the state of Arizona are based upon the experience of your petitioner in his sales, compromises and collections, together with an inspection of the real property. Upon the promissory notes secured by mortgages on lands outside of Arizona, which came into the physical possession of your petitioner as an Arizona asset, an arbitrary allowance of 40% is made to cover possible losses upon collections, your petitioner believing that such a deduction will more than cover any losses that are likely to be sustained in the administration of the receivership estate. A deduction of 75% has been made on the furniture and fixtures, for the reason that the valuation thereof appearing on the books of the corporation

represents the original cost of such furniture and fixtures and no depreciation had been taken thereon during all of the time that it has been in use by the corporation. Your petitioner therefore believes that 25% of its original cost would probably be the amount realizable by the receiver in disposing of such asset. The net estimated value of the Arizona assets is $1,349,613.35.

That Exhibit II attached hereto is a statement of the assets outside of the state of Arizona and in the hands of ancillary receivers or state officials, but in the constructive possession of this Court, and subject to the rights of the [59] primary receiver and by the decree of this Court title vests in the receiver appointed by this Court and his successors in office. These assets are shown on said Exhibit II as they appeared on November 30, 1935, in the sum of $1,135,229.34. It will be noted that we have made a deduction of 40% from the figures shown by the ledger balances as of November 30, 1935 upon loans secured by mortgages and conditional sales contracts and upon real estate owned by the defendant corporation. In making this deduction for possible losses your petitioner has set up an amount which he believes will be more than sufficient to cover any such losses. In making the deduction for depreciation on furniture and fixtures outside of the state of Arizona, your petitioner has followed the same rule that he applied to this item within the state of Arizona, namely a reduction of 75% from the amount set up on the books of the corporation as the cost price. The total deduction made on

assets outside of the state of Arizona is $365,179.87, leaving a net estimated value of $770,049.47.

By reason of the fact that the final decree in this proceeding was not signed and filed until January 5, 1937, it was impracticable and beyond the powers of your petitioner to have made any detailed personal inspection and appraisal of the properties situated in states other than Arizona that came into his constructive possession, until subsequent to the signing of said final decree on January 5, 1937, and there was not sufficient time between that date and April 1, 1937 for your petitioner to make this inspection and appraisal and perform his other duties as receiver of said corporation.

In connection with Exhibits I and II it will be noted that your petitioner has deducted for such possible losses the sum of $613,408.41, which amount in the opinion of your petitioner is more than adequate to cover any such losses, making a total net estate of $2,119,662.82. [60]

XXXVI.

Among these items, shown in Exhibit No. I, is an item of $15,000.00. This is represented by a trust agreement to secure an indebtedness from J. A. Swanson & Co., Ltd., your petitioner having sold the Canadian assets to said J. A. Swanson & Co., Ltd. and the indebtedness being secured by said trust agreement. This was done upon an order of the Court duly made after these assets had been appraised by independent appraisers appointed by this Court as having a value of $15,000.00, these

appraisers including a bank officer and officer of a title company and an attorney. There had been previous appraisals made by responsible parties in Canada, giving the assets approximately the same valuation. These assets appear upon the inventory and report of November 30, 1935, as having a book value of $39,896.32.

A former representative of the defendant corporation in Canada had collected $12,405.95 upon the Canadian assets and diverted the same to his own use. Recovery of this amount was practically hopeless. The cause of action for the recovery of the same for whatever it might be worth was included in the sale to Messrs. Swanson & Company.

The securities taken in Canada by the defendant corporation were very poor and scattered over much territory in the Western part of that country, and some of the loans were on properties more than 100 miles distant from railroads and located in lumber and mining camps which had ceased operation.

In addition to the foregoing, very drastic moratorium laws had been enacted in Canada which rendered collection of these assets by your petitioner almost impossible. A further difficulty arose from the fact that these assets were situated in a foreign country and it was practically impossible for [61] your petitioner to administer them from Arizona, and to administer them through the Canadian courts would be difficult and the expense would probably consume the bulk of such assets.

XXXVII.

That among the assets of the defendant corporation at the time your petitioner took actual possession on November 30, 1935, were 175 promissory notes secured by mortgages upon real property in Arizona, purporting to represent an indebtedness to said corporation in the sum of $431,118.04, a detailed statement of which appears on pages 9 to 19, inclusive, of said inventory prepared by James A. Smith, C.P.A.

XXXVIII.

That 40 of said promissory notes were refinanced through the Home Owners Loan Corporation, from which your petitioner received the sum of $56,821.00 in cash or bonds from said Home Owners Loan Corporation. In addition thereto he received additional salvage in the form of cash and notes and mortgages from the mortgagors amounting to the sum of $6,314.88; that the total amount of cash and bonds, together with the salvage received on these notes amounted to the sum of $63,135.88; that he collected $920.44 on said salvage up to the 1st day of April, 1937.

In addition to the above your petitioner took from the mortgagors of said notes, assignments of three certificates of the Intermountain Building & Loan Association of Arizona, assignments of two certificates of the First National Building & Loan Association of Arizona, and assignments of two certificates of the Intermountain Building & Loan Association of Utah, having a face value of $2,144.55,

on which he had collected prior to the consummation of the settlements with the Home Owners Loan Corporation $293.28, and the sum of $40.65 subsequent to that [62] time. Dividends on certificates having a face value of $1463.19 are to be applied on the salvage notes, and the remainder was taken as additional salvage. The real value of these certificates cannot be computed at this time.

That attached hereto and made a part hereof marked Exhibit No. V is a statement of these settlements with the Home Owners Loan Corporation and the salvage taken, together with a statement of the amounts received on such salvage; that your petitioner has heretofore filed with this court a detailed account of each of the transactions with the Home Owners Loan Corporation.

That in all settlements obtained from the Home Owners Loan Corporation, your petitioner obtained 100% of the value of the securities as determined by the appraisals made by the officers of that organization, and in addition thereto obtained the additional salvage in cash, notes, mortgages and assignments of certificates as hereinbefore stated. Your petitioner believes, from his knowledge of the parties and the properties, that a sum of at least $4,000.00 of the face value of said salvage should be recovered.

XXXIX.

That 25 of said promissory notes and mortgages which came into the possession of your petitioner on November 30, 1935, as shown on Exhibit No. VI hereto attached, were collected in full, amounting

to the sum of $14,644.05, and the mortgages released of record. These notes were set up on the books of the corporation as having a value of $14,963.94, but the sum of $1,886.49 thereof consisted of usurious interest and improper charges, and the actual value as of November 30, 1935, was $13,077.45, and this amount, together with the accrued interest thereon was collected in full. [63]

XL.

That 9 of said notes and mortgages coming into the possession of your petitioner on November 30, 1935, were compromised pursuant to orders of this Court, and the total amount realized thereon was $24,519.47, an itemized statement of which is shown on Exhibit No. VII hereto attached and made a part hereof. On these compromised loans the full value of the securities as determined by this Court after a full hearing thereon, was obtained.

XLI.

That 5 of said notes and mortgages coming into the possession of your petitioner on November 30, 1935, were compromised pursuant to the orders of this Court by your petitioner taking deeds therefor, as shown in Exhibit No. VII hereto attached. These notes were set up on the books of the corporation as having a claimed book value of $15,516.78. All rents collected have been applied to the accounts; the interest has been adjusted by deducting usurious charges; taxes, insurance and upkeep have been paid, the balance due as of March 31, 1937 being

$14,743.48, and the property now stands on the books as real estate owned as of that value.

XLII.

That your petitioner instituted 56 suits in foreclosure covering 61 of said promissory notes and mortgages that came into his possession *of* November 30, 1935, as shown on pages 5 to 9, inclusive, of Exhibit No. VIII hereto attached.

That on 40 of these foreclosure suits, involving 44 mortgages, judgments have been obtained and sheriff's certificates of sale issued thereon, the total amount of said judgments amounting to $201,943.97, as shown on pages 1 and 2 of said Exhibit VIII. The amount of the principal as carried on the books of the corporation amounted to $135,648.76, as shown [64] on the inventory of April 1, 1937. Interest, taxes, repairs, insurance and costs of foreclosure, including attorney's fees allowed in the sum of $13,350.64, were added to this amount and judgments procured in the said sum of $201,943.97. The properties were sold at sheriff's sale by your petitioner for $175,124.00 and deficiency judgments in the amount of $26,819.97 were taken. Three deficiency judgments totalling $700.00 were satisfied and released in consideration of the Receiver being given immediate possession of the premises and quit claim deeds relinquishing their rights of redemption. In certain instances where the judgment debtors were execution proof, your petitioner bid the full amount of the judgment in consideration of the mortgagors waiving their equity of redemption

and surrendering possession of the property, so that your petitioner could obtain the income from the rents thereof that he would not have been able to have otherwise obtained without the expense of receiverships.

It is the opinion of your petitioner after a careful inspection of these properties, that together with the rentals received and to be received, the sale price and the deficiency judgments, there should be recovered in the aggregate 75% of the amount of the judgments. In this connection it should be noted that in every instance the Receiver is in possession of the property and receiving the rents, issues and profits thereof.

That 14 of said foreclosure suits covering 15 loans were still pending at the time your petitioner turned over the assets of said corporation to his successors Harry W. Hill, Esq. The principal balance due on these loans as of April 1, 1937 amounted to $29,947.78, and the amounts of the judgments prayed for in said suit amounted to the sum of $42,242.67, as shown on page 4 of Exhibit VIII hereto attached. [65]

That two of said suits in foreclosure, pertaining to Loans No. 1727 and 2109 were compromised by taking a deed in one instance (Exhibit VII), and receiving the entire balance due in the other (Exhibit VI).

XLIII.

That 37 of said notes and mortgages which came into the possession of your petitioner on November 30, 1935, are still outstanding on the books of the

corporation as shown on Exhibit No. IX hereto attached. The amount due on these accounts is shown in the inventory of November 30, 1935, as $106,463.25. That after deducting collections subsequently received and applied thereon, and deducting usurious interest charged, there remained due as of April 1, 1937, the sum of $96,860.44. That the entire amount thereof should be recovered for the benefit of the estate, with the exception of Loan No. 951, where the Court had authorized a compromise which would show a book loss of $210.57.

XLIV.

The items in the accounts shown on Exhibit VIII, page 4 hereof, "Foreclosure Suits Pending", and in Exhibit IX hereof, "Notes and Mortgages Upon which Payments were being made April 1, 1937," together with account No. 2204, Catherine Short, which is included in Exhibit VIII, page 2, "Real Estate subject to Redemption (which loan was foreclosed and sheriff's certificate of sale obtained thereon), are all included in the inventory of Harry W. Hill, Esq., dated April 1, 1937, under the title of "Real Estate Loans—Arizona". All of these items are brought into reconciliation with said inventory of Harry W. Hill, Esq. on Exhibit IX hereof. [66]

XLV.

With reference to the foreclosure suits pending (Exhibit VIII, page 4), and the active mortgages outstanding (Exhibit IX), which comprise 52 accounts, forty-three thereof are amply secured by

the lands mortgaged, based upon my valuation of same after a careful inspection of the properties in question. As to the remaining properties, as a result of the inspection and appraisal made thereof by your petitioner, he is of the opinion that there will probably be a loss thereon.

Among these loans is one to Lynn Lockhart, No. 2276, in the amount of $58,027.96. While your petitioner does not believe that the present market value of the property securing this loan is sufficient to save the defendant corporation from loss, after deducting the taxes and assessments, some of which had accumulated prior to the making of the loan, he believes the financial responsibility of Mr. Lockhart is sufficient to offset any such loss, and that the full amount could be collected. In connection therewith, this property is in the possession of the Receiver, and he is deriving a monthly rental therefrom of $500.00 per month.

The loan to Andrew Bettwy, No. 1637, upon which foreclosure proceedings have been instituted, and which is carried on the books of the corporation at $2,347.73, your petitioner regards as very doubtful, for the reason that the taxes and paving assessments were allowed to accumulate against said property by the mortgagor and the Corporation since the date the loan was made. However, it may be possible to collect a judgment against Mr. Bettwy for the unpaid balance upon this loan in the mortgage foreclosure proceedings pending.

As to the loan of the Ingleside Land Company, No. 2290, carried on the books of the corporation

at $9,650.84, the security thereon is sufficient, provided the theory of the attorneys for [67] your petitioner as expressed in their opinion is correct in connection with a suit which is now pending in the courts in regard to this matter, this cause being No. 42100-A, Superior Court of Maricopa County. The attorneys who represented me as Receiver have advised that in their opinion a judgment can be obtained in favor of the Receiver, together with foreclosure of the rights of the defendant corporation in the premises, which can be collected out of the securities given. They further advise that the rights of the Receiver for the Intermountain Building & Loan Association is superior to that of Y. C. White, Superintendent of Banks of Arizona as to a portion of the property involved.

Loan No. 378, Eleazor S. Munoz, in the amount of $483.04 has been foreclosed and judgment taken. This, together with the rents and sale price, will probably pay out.

Loan No. 951, C. G. Madrid, in the amount of $360.57, this Court has entered its order authorizing a compromise in the amount of $150.00.

Loan No. 1212, Dewey Farr, in the amount of $1203.17 will probably pay out approximately $1,000.00; foreclosure proceedings have been instituted.

Loan No. 1467, Vinton Hammels, in the amount of $1381.43 will probably pay out around $1200.00; foreclosure proceedings have been instituted.

Loan No. 2198, John G. Hales, in the amount of

$1151.26 will probably pay out around $1,000.00; foreclosure proceedings have been instituted.

Loan No. 2124, J. R. Williams, in the amount of $5,059.74 should pay out on the basis of around $3,500.00; foreclosure proceedings have been instituted.

Loan No. 2289, Robt. H. Cairns, in the amount of $2262.70 will probably pay out on the basis of about $2,000.00; foreclosure [68] proceedings have been instituted.

Improved market conditions may minimize the loss on these accounts, and some may in some instances be offset by deficiency judgments.

XLVI.

That the following is a summary of the handling of said 175 notes and mortgages taken over by your petitioner on November 30, 1935:

25 were paid in full (Ex. VI), amounting to	$ 14,644.05
40 were refinanced through H. O. L. C. and salvage taken (Ex. V) in the amount of	63,135.88
Amount recovered on assigned certificates taken as additional salvage thereon	333.93
44 were converted to judgment and sheriff's deed taken, (Ex. VIII, p. 1-2) in the amount of	201,943.97
15 were in suits pending in foreclosure on April 1, 1937, the amount prayed for in the judgments (Ex. VIII, p. 4) amounting to	42,242.67
9 were compromised (Ex. VII) for the amount of	24,519.47
5 deeds were taken (Ex. VII) April 1, 1937 balance	14,743.48
37 remain active, (Ex. IX), the balance due as of April 1, 1937 being	96,860.44

XLVII

That as shown by the inventory of James A. Smith, C. P. A., pages 48-50 thereof, filed in this

proceeding, 80 pieces of real estate situated in the state of Arizona came into the possession of your petitioner on November 30, 1935, having a total balance on the books of the corporation of $396,-415.86.

That 10 of these properties were sold for cash in the aggregate sum of $64,250.00, as shown on Exhibit No. X hereto attached. The appraised value thereof as fixed by appraisers appointed by this Court was $66,287.00. The amount realized therefore was approximately 97% of the appraised value of the properties sold.

That 13 of these properties were sold on contract for [69] the aggregate sum of $18,700.00, plus taxes assumed by the purchaser of one of the properties in the sum of $1353.05, the total consideration being $20,053.05, as shown in Exhibit No. X hereof. The appraised value thereof as determined by appraisers appointed by this Court was $19,315.00. The amount realized therefore was more than 100% of the appraised value of said properties. This indebtedness is amply secured and will pay out in full.

This Court prior to the 1st day of April, 1937, confirmed the sale of 4 pieces of real estate, as shown in Exhibit No. X hereof, for the aggregate sum of $8,142.50, the full amount of which should be recovered. These sales were made by your petitioner prior to April 1, 1937 and final orders confirming such sales had been made by the Court, but the titles had not been approved by the representatives of the purchasers until subsequent to

April 1, 1937, when the considerations were paid to the successor of your petitioner. The appraised value of these properties as determined by appraisers appointed by this Court was $8,400.00. The amount realized therefore was more than 96.8 per cent of the appraised value.

Two pieces of property, REO No. 341 and 360, which had been foreclosed by said Association, were refinanced through the Home Owners Loan Corporation, as shown on Exhibit V hereto attached. The total amount received thereon was $3,697.57 in cash and bonds, and $131.00 in salvage, on which the sum of $44.61 has been collected.

That 51 of said properties are still unsold and possession remains in the Receiver, as shown on Exhibit No. XI hereto attached. The balance as shown on the books of the corporation as of November 30, 1935 amounted to $269,858.01. The balance as of April 1, 1937, amounted to the sum of $269,951.00, [70] which reflects interest adjustments made, payments of paving assessments and improvements, together with amounts credited for deposits which were made by prospective purchasers, as shown on said Exhibit XI, which also shows the reconciliation of Real Estate Owned as shown in the inventory of April 1, 1937.

XLVIII

That the following is a summary of the handling of said 80 pieces of real property which came into the possession of your petitioner on November 30, 1935:

10 were sold for cash (Ex. X)	$ 64,250.00
13 were sold on contract (Ex. X)	18,700.00
4 were sold prior to April 1, 1937, but consideration was not received until after said date (Ex. X)	8,142.50
2 were refinanced through H. O. L. C. (Ex. V)	3,828.57
51 remain unsold, the ledger balance as of April 1, 1937 (Ex. XI) being	269,951.00

XLIX

That on the 25 mortgages collected, 40 refinanced through the Home Owners Loan Corporation and 9 compromised, and the 10 properties sold for cash, 13 sold on contract, 2 refinanced through the H. O. L. C. and 4 sold prior to April 1, 1937, but on which consideration had not been received until subsequent to April 1, 1937, your petitioner received in excess of the amounts required by statute and in the aggregate, 90% of the appraised value thereof.

L.

That there were five real estate contracts outstanding on the books of the corporation at the time your petitioner took possession, as shown on page 41 of the inventory of November 30, 1935.

Contract No. 161, Tony M. Coury, was paid in full in the amount of $226.73.

Contract No. 117, F. E. Fidler, and Contract No. 148, Troy J. Welch were cancelled for the reason that the purchasers failed to meet the terms of their contracts. These items were [71] transferred to Real Estate Owned, and are shown in the inventory of April 1, 1937, as REO 366, ledger balance $1127.66, and REO 367, ledger balance $1734.39.

Contract No. 170, showing a balance of $3,077.52 and Contract No. 181 of $968.82, as of April 1, 1937, are still in effect, and will undoubtedly be paid out in full as they are amply secured.

LI.

That there were listed certain assets claimed by the Corporation, totaling the sum of $51,000.00, said assets consisting of stocks in the Home Building & Loan Association, Insolvent. These stocks were worthless at the time these assets were turned over to your petitioner and are now worthless. They represent unlawful and illegal investments made by the officers and directors of the defendant corporation, and are not listed as an asset on Exhibit I. hereto attached.

LII.

That there was also included on the books of the defendant corporation accounts with the defunct First National Bank of Mesa, the defunct Yuma National Bank, and J. E. Moore, Insolvent, totaling the sum of $468.89, on which your petitioner collected $19.93 in dividends. These insolvent matters have been closed, and the book loss to the defendant corporation is $448.96.

LIII.

That an adjustment was made on the account of Wm. G. Tisdale, No. 1457, making him an allowance of $57.71. A similar allowance was made on No. 2127, George Bly, of $41.24, as shown on

Exhibit No. VII hereto attached. These allowances were made under orders of Court and the accounts continued in force. [72]

LIV.

In order to reconcile the ledger accounts found on the books of the corporation as of November 30, 1935, with the refigured and adjusted interest after the same was computed to eliminate usurious charges and penalties, and account was set up on the books as "Receivers Set-Off in Liquidation—Arizona", which set-off amounted to $15,757.57 as of April 1, 1937.

An account entitled "Loss on Realization", or "book loss" was set up also in order to reconcile the inventory ledger balance and the difference between the amount realized when the property was disposed of and the amount carried on the books of the corporation claimed as being due it. This book loss amounted to $50,639.04, as of April 1, 1937, as shown on Exhibit No. XII hereto attached, and corresponds with the amount shown in the inventory of Harry W. Hill, Esq.

It will be noted that this book loss is in no sense a loss due to the administration of your petitioner, but was simply carried on the books of the corporation to reconcile the difference between the amount claimed as due by the corporation and the amount received by your petitioner.

LV.

That a part of the assets under the direct supervision and control of your petitioner was a certain property in the state of Nebraska having a claimed value of $9481.33 as of November 30, 1935. No legal proceedings in the nature of ancillary receivership was had in the state of Nebraska but all handling of the property was direct from the Phoenix office. The property is valuable and under order of this Court the mortgage existing against said property was paid when it became due, together with the taxes, etc., in order to preserve the property for the benefit of the receivership estate. [73]

LVI.

There is also a property situated in Jennings, Oklahoma, REO 32, carried on the books of the corporation as having a value of $630.17 as of November 30, 1935. This property I regard as of doubtful value by reason of taxes, etc. accumulated thereon subsequent to the date when title was acquired by the Association, namely September 26, 1927, and the present deserted condition of the community; that it would probably be to the advantage of the estate to abandon same. This property is not listed as an asset on Exhibit I hereto attached.

LVII.

The office fixtures and miscellaneous personal property listed in the inventory prepared by James A. Smith filed in this cause, have all been turned over to Harry W. Hill and accounted for in his

inventory of April 1, 1937, except such items as were sold for cash pursuant to orders of this Court; that the money received for same is reflected in the cash account.

LVIII.

That all assets and records pertaining to states other than Arizona which are listed in the inventory prepared by James A. Smith, except those which were forwarded to ancillary receivers or state officials pursuant to orders of this court, were turned over to Harry W. Hill, and are accounted for in his inventory of April 1, 1937.

LIX.

That all promissory notes and certificates pertaining to certificate loans listed in the inventory prepared by James A. Smith, were turned over to Harry W. Hill, and are accounted for in his inventory of April 1, 1937. [74]

LX.

That after this Court had taken jurisdiction of this matter in April, 1933, and during the time when the Bank Commissioner of Utah was in possession of the assets of the corporation in Arizona, certain contracts and agreements were made with certain creditors of the Association by which assets of the Corporation were disposed of to them, and it was necessary for your petitioner to take legal action to protect the rights of the creditors from the preferences attempted to be created in this manner. While this litigation is not yet set-

tled, the principles involved are largely controlled by the decision in the Foerst case, hereinbefore referred to, and your petitioner has no doubt that the final decision will be in favor of the receiver of the Intermountain Building & Loan Association. These cases are set out in Exhibit No. XV hereto attached.

LXI.

That there is also listed on Exhibit No. XV hereto attached the suits brought by your petitioner to recover assets of the Association. In particular, your petitioner desires to direct attention to case No. 44001 to recover assets which it is alleged were fraudulently disposed of by Mark E. Waddoups to the Beneficial Investment Company and from the Beneficial Investment Company to Edw. G. Jenkins and Edna T. Jenkins. The properties conveyed are very valuable, and in the event said suit is determined favorably to the receivership estate a very substantial recovery should be had for the benefit of the creditors thereof.

Another suit to which your petitioner directs attention, is the suit brought against the Fidelity & Deposit Company and the officers of the Corporation. Your petitioner upon his own investigation and the advice of his counsel, is of the [75] opinion that $50,000.00 can be recovered from the defendants and the surety company for the benefit of this receivership estate.

In case No. 44055 against the City of Phoenix filed in the Superior Court of Maricopa County, your petitioner was successful in saving to the re-

ceivership estate a large sum of money claimed as due for interest and penalties on delinquent taxes.

LXII.

That the assets of the defendant corporation located in states other than Arizona which came into the constructive possession of your petitioner, and which is referred to in paragraph VII hereof, are set out in detail in the inventory of James A. Smith, on file in this court, and except for the items forwarded to ancillary receivers or state officials in charge of the estate in the several states pursuant to orders of this Court, were all turned over to Harry W. Hill, as shown in his inventory of April 1, 1937.

That the value of these assets in the judgment of your petitioner, using his best judgment and discretion, is set out in Exhibit II hereto attached.

LXIII.

That your petitioner received no moneys from any of the several states, either from ancillary receivers or state officers, and that all changes in balance shown on the exhibits hereto attached relating to assets in said states, are based solely upon reports furnished him by said ancillary receivers or state officers.

LXIV.

That the assets in Wyoming are being administered by John T. Boyd as receiver appointed by the United States District Court for the District

of Wyoming, upon the petition of your petitioner which was filed pursuant to orders of this Court. [76] That in Wyoming the State Examiner claims a preference for residents of Wyoming to the amount of $50,000.00 of notes and mortgages deposited with said official over residents of other states.

LXV.

That the assets in Idaho are being administered by Chas. A. McLean and H. S. McCluskey, co-ancillary receivers appointed by the United States District Court for the District of Idaho upon the petition of your petitioner, which was filed pursuant to the order of this Court. No preference for Idaho residents is claimed.

LXVI.

That the assets in Utah are being handled by James L. White as ancillary receiver appointed by the District Court of the Third Judicial District in and for Salt Lake County, State of Utah, upon the petition of creditors, the said administration being ancillary to the administration in this court. No preference for Utah residents is claimed.

LXVII.

That in the state of Oregon the assets are in the possession of the Corporation Commissioner of that state who asserts that under Oregon laws he is the statutory liquidator; that the rights of the plaintiffs and those similarly situated who are residing outside of that particular state is being con-

tested and a preferential right is being claimed for creditors residing in that state, disregarding entirely the equitable and legal rights of the creditors of this Corporation under the Constitution of the United States and the rules laid down by the Supreme Court of the United States. That pursuant to the order of this Court, your petitioner filed a petition in the United States District Court for the District of Oregon to establish the rights of the creditors in general. The case was heard before [77] a Master appointed by the court in January, 1937, but no decision had been rendered up to the time your petitioner turned over the assets of the Corporation to Harry W. Hill.

LXVIII.

A similar duty was imposed upon your petitioner in regard to the assets in California which were in possession of the Building & Loan Commissioner of that state, who likewise refused to recognize the rights of the creditors of the corporation in states other than California.

That pursuant to the order of this Court, a suit was filed in the United States District Court for the Southern District of California. Under the law, the nature of the case required the matter to be tried before a three-judge court. The matter was still pending and had not been heard at the time your petitioner turned over the assets of the Corporation to Harry W. Hill.

LXIX.

In connection with the matter of obtaining the appointment of these ancillary receivers, and in connection with the preparation of the data and evidence for filing suits in the several states and in the preparation of the pleadings and briefs, entailed a large volume of work by your petitioner, his office force and counsel, and by James A. Smith, C. P. A. This was necessary for the reason that all the records and data were in the possession of your petitioner.

All of the matters pertaining to the assets in the foreign states necessarily involved incurring an expense for the protection of the rights of the creditors and the preservation of the receivership estate, all of which proceedings were had pursuant to orders of this court. These expenses while paid by your petitioner are not properly chargeable to the liquidation of the Arizona assets alone, but are a proper expense [78] against the entire receivership estate.

LXX.

Under the decisions of the Supreme Court of the United States the lien of the plaintiffs and others similarly situated extended to each and every piece of property of the defendant corporation wherever situated, and the rights of such creditors were equal under the constitution of the United States, regardless of their residence or citizenship, so that aside from the matter of litigation, a large portion of the time of your petitioner and of the office force under his control, as well as the time of his attor-

neys, was required for the handling of the assets of the corporation situated in states other than Arizona.

Your petitioner was charged with important duties in regard to the handling of these assets under the provisions of the Amendment of 1935 to Section 847-848-849, Title 28, of the United States Code, Ann.

Among the duties required of your petitioner was the transfer under proper orders of this Court of books, records, notes, mortgages, etc. to the ancillary receivers or state officers in the states of Wyoming, Utah, Oregon, Idaho, California and Canada, for the purpose of aiding in the collection of the assets of the corporation in these states for the benefit of the creditors as a whole.

Another duty which required the expenditure of a great deal of time and expense in connection with the matters in the said states, and which is properly chargeable to the receivership estate as a whole, necessitated the giving of notice to all creditors in these foreign states concerning their claims, furnishing them blanks and data to enable them to file their claims, and answering their correspondence in connection therewith, and filing said claims pursuant to the order of this [79] Court which required that all claims be filed with your petitioner as the Primary Receiver of said defendant corporation, in order that this Court would be in a position to determine the rights of all the creditors of the Association wherever situated. This is an expense

not properly chargeable to the administration of the Arizona assets alone.

LXXI.

That by the final decree of this Court entered on the 5th day of January, 1937, title to all of the assets in the state of Arizona is vested in the Receiver of the defendant corporation.

That in accordance with the usual practice where trust properties are involved, said decree required the conveyance to the Receiver, in trust for the plaintiffs and others similarly situated, of all of the properties of the defendant corporation situated outside of the physical boundaries of Arizona, in order to enable the Receiver to give good title to the premises when disposing of same and to facilitate the liquidation of the receivership estate in accordance with the provisions of Title 28, Sections 847-849, inclusive, U. S. C. A. as amended in 1935.

That after said final decree was entered and served upon the attorneys for the defendant corporation, the directors of said defendant corporation failed to make said conveyances in accordance with said decree, and your petitioner thereupon procured an order to show cause from this Court why they should not comply with the terms of the decree of this Court, and this Court having entered a proper order requiring them so to do, the said directors thereupon held a meeting and appointed Stanley Jerman, Esq. as agent for the corporation to execute such conveyances. That your petitioner then prepared the legal descriptions of

all of the various properties [80] located in the several states for inclusion in the said conveyances, and the attorneys for your petitioner were completing the deeds as rapidly as time would permit. Said conveyances had not been completed at the time your petitioner turned over the assets of said corporation to Harry W. Hill. However, the work done by your petitioner in connection with the legal descriptions was available to and could be used by the said successor of your petitioner in having the properties conveyed to him. That in order to avoid excessive recording charges these conveyances were divided into conveyances covering properties located in the several counties of the aforementioned states.

LXXII.

Having in mind the necessity for as speedy an administration of this receivership estate as the condition of the assets would permit, your petitioner conducted all of these receivership proceedings under high pressure, both of himself, his attorneys, and of the force employed by him, with the plan in mind that the receivership estate could be closed within a period of approximately thirty months from the time that he obtained the physical possession of the assets on November 30, 1935, and that within such time the assets of the defendant corporation could be reduced to cash without a sacrifice of the interests of the creditors of the Corporation.

That within said period he proposed recommending to the Court the payment of dividends to credi-

tors filing claims in the proceedings as soon as a reasonable time was allowed for the filing of these claims and as soon as the questions of law arising in the foreign states as to claims of preferential rights in the premises were determined. The time fixed by the order of this Court for the filing of claims expired on the 22nd day of February, 1937, and such was a reasonable time for the [81] filing of these claims, which was necessarily long because of the fact that these creditors were scattered over many states and foreign countries, including China.

That at the time your petitioner turned over the assets of the corporation to Harry W. Hill, there was on hand a sufficient sum of cash and liquid assets in the hands of your petitioner for the declaration of a substantial dividend to these creditors, but that it was impossible to pay such a dividend until there was a satisfactory termination of the litigation in the states hereinbefore mentioned and suitable accounting to your petitioner by the ancillary receivers appointed in other jurisdictions by the courts of Wyoming, Idaho and Utah.

LXXIII.

That from a close study an analysis of the securities held by the defendant corporation and the results of the receivership administration to April 1, 1937, your petitioner feels justified in saying that the assets now in possession of the present receiver, together with the assets in the hands of the ancillary receivers and state officers of other states, are sufficient to net dividends amounting to at least 70% upon the claims filed in this proceeding.

Your petitioner feels that the results heretofore obtained in the sales and settlements made in Arizona, and which are shown in the exhibits attached to this report, are sufficient evidence to support this conclusion.

LXXIV.

That Exhibit No. XIII hereto attached is a summary of the changes between the amounts set out in the original inventory prepared by James A. Smith and filed in this Court and the inventory of Harry W. Hill filed in this Court, wherein receipts, offsets and adjustments are shown as charges to the [82] respective accounts set out in your petitioner's inventory and his operating accounts, and the disbursements, offsets and adjustments are shown as credits to the respective inventory and operating accounts, all of which reflect the net change in the cash on hand and in banks received by your petitioner as of November 30, 1935 and as receipted for by Harry W. Hill on April 1, 1937, and in the respective accounts.

This summary and exhibit was prepared by Mr. C. M. Berge, who was employed by your petitioner as auditor and has been retained as such by Harry W. Hill, who succeeded your petitioner as Receiver, subsequent to the accounts and assets being turned over to Mr. Hill.

The method and form of accounting was set up for your petitioner by Mr. James A. Smith, Certified Public Accountant, appointed by this Court in co-operation with Mr. C. M. Berge who had been auditor for the corporation prior to receivership.

The said Exhibit and summary upon information and belief of your petitioner accurately reconciles all balances shown with corresponding items in the original inventory of assets and liabilities on file in this Court as prepared by James A. Smith, C. P. A., and the inventory of Harry W. Hill on file in this court.

Every dollar of cash received by your petitioner was deposited in the banks designated by this Court and every expenditure made therefrom is shown by voucher and check on file with Harry W. Hill, pursuant to the order of this Court, dated March 26, 1937.

Every dollar of offsets charged to expense or deducted by reason of compromises, adjusted interest, or loss on realization from ledger balances which were accepted and used as inventory balances by your petitioner and his successor, are shown on vouchers and on the books and records turned over to Mr. Hill [83] pursuant to orders of this Court, and are shown in substantial detail in the several exhibits made a part of this report.

No breakdown of expense of operation as between the Arizona office and the work done in connection with accounts and assets in other states is shown on the exhibits or on the books.

All receipts of cash, all journal transactions, all adjustments and all disbursements, all accounts of agents in charge of rental property, showing the gross receipts less agent's deductions for commissions and expenses therefrom, and all and every

transaction between November 23, 1935 as of November 30, 1935 and June 1, 1936 were accounted for on a National Cash Register accounting machine.

The said accounting machines which were in use at the date your petitioner took over the duties of his office did not provide for a segregation between cash items and other adjustments. However, the details of each and every transaction passed through the accounting machines and affecting the receiver's records are shown in detail upon the machine audit strips and upon accompanying vouchers, all of which constitute the original record of entry of the transactions during said period, and which are at the order of this Court now in the possession of Harry W. Hill.

On June 1, 1936, the method of keeping the records was changed from the machine accounting system to a manual system, for the reason that the machine did not belong to the receivership estate and the price asked for the same from your petitioner to purchase it was excessive.

That to designate the change in each note, contract and property accounts held by your petitioner during the period between November 30, 1935 and April 1, 1937, would require a report so voluminous as to exceed in size the joint inventories filed by your petitioner and his successor, and would necessitate [84] several weeks of labor of an expensive and costly nature and which would interfere with the office routine of the successor of your petitioner and his use of said records and which your

petitioner does not feel justified in the premises.

The titles of the accounts set out in the Exhibit are of course arbitrary and are adapted to correspond with the accounts as kept by the corporation, and may, unless the breakdowns are examined, be somewhat confusing—to illustrate: In the real estate operating account there is charged as expenses of operating, taxes, street and sewer assessments, insurance, title expense, repairs and maintenance—all of which were not a true expense of operation, but necessary disbursements for preservation of the properties comprising the estate, and represent for the most part liabilities against the estate at the date your petitioner was appointed. However it was necessary to charge and carry them as expense in order to reconcile the accounting with the inventory balances and the individual accounts.

There is no separate segregation of accounting expense as between the cost of taking inventory, reducing the property to possession of your petitioner as Receiver and the actual expenses involved in litigation, both here and in other states, looking toward recoveries upon bonds of officers of the corporation and from said officers, and expenses of foreclosure of mortgages which provide for the payment of attorney fees which are recoverable items, all of which were made for the preservation of the receivership estate, and as said are not in truth and in fact items of expense chargeable to operation.

The accounts reflecting changes in states other

than Arizona are based upon reports furnished your petitioner by ancillary receivers and state officials in possession of the assets in said states, and constitute book entries only, as no moneys were turned over to your receiver by said ancillary [85] receivers and state officers.

LXXV.

That your petitioner at the time of his appointment as Receiver, was and now is a member of the State Bar of Arizona and of the Bar of the District Court of the United States in and for the Ditsrict of Arizona and of the United States Supreme Court, and engaged in the active practice of the law, and maintained a law office in the city of Phoenix, Arizona.

That upon the appointment of your petitioner as Receiver pendente lite and the giving of the supersedeas bond hereinbefore referred to, your petitioner was instructed by Hon. Fred C. Jacobs, Judge in and for the Federal District of Arizona, who was then presiding in said proceeding, to act as his own attorney during the pendency of the appeal proceedings; that your petitioner acted as his own solicitor during all of said period, towit, from the 20th day of April, 1934, up to the 30th day of November, 1935, a period of nineteen months and ten days, at which time the Court, by orders duly made, appointed counsel in aid of and to represent your petitioner as receiver in further proceedings.

LXXVI.

That during the time said case was on appeal your petitioner received and carried on a voluminous correspondence initiated by mortgagors in this and other states who were in doubt as to whether to make payments upon their notes and mortgages to the state officers claiming the right to administer the assets in the several states—including the Bank Commisisoner of Utah who claimed the right to administer the assets in the state of Arizona—or whether to make payments to your petitioner as receiver.

Your petitioner also had numerous interviews with [86] mortgagors and their attorneys. He also had a voluminous correspondence with numerous mortgagors and their attorneys in this and other states, pertaining to the refinancing of their mortgages through the Home Owners Loan Corporation. He also had correspondence and conferences with state officers claiming the right to administer the assets, and their atorneys, and with officials and attorneys of the Home Owners Loan Corporation pertaining to the refinancing of mortgages through the Home Owners Loan Corporation. He was also called upon by certificate holders to determine what they should do with reference to making further payments on their certificates, or collecting the same, and also had voluminous correspondence and numerous conferences with certificate holders and their attorneys pertaining to their rights.

Your petitioner was also served with pleadings

in suits brought against the corporation and J. A. Malia, Bank Commissioner of the State of Utah, who was in possession of the assets of the Association, which required the study of these cases and his responsibilities and labilities in connection therewith for the protection of the receivership estate.

He was also required by his duties to investigate and study the laws and decisions of the courts of the several states and the Home Owners Loan Corporation Act, and the laws and decisions pertaining to Federal Equity receivership, so that his actions in the premises would protect the receivership estate and would not subject him and his sureties to any liability for his acts or failure to act in the premises.

In all of these matters your petitioner, under direction of the Court, acted as his own solicitor, and as a result thereof at least one half of his time between April 20, 1934 and November 30, 1935 was consumed in matters pertaining to his appointment as receiver pendente lite of the defendant [87] corporation, and he was by reason thereof prevented from taking other business, and particularly any business which in any way pertained to or conflicted with his appointment as receiver of the defendant corporation.

LXXVII.

That beginning with the 30th day of November, 1935, to and including the 1st day of April, 1937, after your petitioner was made permanent receiver, his duties as such receiver were so great that he

was compelled to bring in other attorneys to take care of his pending law practice on matters not related to the receivership, to refrain from taking on new business and to close his law office and devote practically all of his time to the affairs of the receivership estate. In no other way could the interest of the creditors of the corporation be protected and the liquidation of the estate be reasonably expedited and payments of dividends made to creditors. And in this connection your petitioner labored, not only during reasonable office hours, but at night and even on Sundays and Holidays, in many instances working during the day and driving to the various cities of the state at night on the business of the receivership.

LXXVIII.

That beginning with the 2nd day of December, 1935, to the 1st day of April, 1937, your petitioner and his attorneys have filed in this court 549 separate instruments, many of which are supported by exhibits, and all of which necessitated many appearances in court by your petitioner and his attorneys, both in Phoenix and in Prescott, Arizona, and also many of which matters required the preparation of briefs and diligent study of the law and decisions pertaining thereto. That a transcript of the docket entries thereof is shown in Exhibit XIV hereto attached.

This exhibit does not take into consideration the [88] pleadings and briefing of the cases filed in the states of Wyoming, Utah, Idaho, California

and Oregon, nor the voluminous exhibits prepared in connection with the sale of the Canadian assets, nor the briefing of the law in connection therewith, nor the appearances in the courts of said states. Nor does this exhibit include the list of pleadings, etc. filed in connection with the foreclosures of mortgages in the Superior Courts of the various counties of this state, many of which were contested and moratoriums asked, a list of which foreclosures being shown in Exhibit VIII, pages 5-9; nor does it list the pleadings, etc. in the miscellaneous cases set out in Exhibit XV; all of which are too voluminous to collate.

LXXVIII.

That in the administration of the complicated affairs of this estate and in connection with the handling and disposition of properties, pursuant to the provisions of the United States Code aforementioned, which entailed a tremendous volume of work, your petitioner was aided by the work of faithful and competent assistants in the office, and the counsel and assistance of Thomas W. Nealon, John L. Gust and E. G. Monaghan, his solicitors and attorneys, who were appointed by the Judge of this Court then in charge of the case, the orders thereon being matters of record in this court; that said solicitors and attorneys rendered satisfactory service and diligently labored for the benefit of the receivership estate; that no payments have been made to said solicitors and attorneys for your petitioner other than the respective drawing accounts

provided for in the orders of this Court at the time of their appointment; that said attorneys advise your petitioner that they will respectively file their separate petitions with this Court asking for an allowance of fees from the receivership estate for the services that have been rendered [89] to your petitioner as said Receiver, and your petitioner requests upon their filing their respective petitions with this Court that proper allowance be made to each of them for the services each has rendered for the benefit of the estate.

LXXIX.

That at the time your petitioner was appointed receiver pendente lite, no compensation was fixed for his services as such receiver or for acting as has own attorney and solicitor, and he was advised by the Judge of the Court then presiding that his services in both capacities would be compensated for as a part of his fee as receiver when his services were terminated; that he has received no advances or compensation on account during the time that he served as receiver pendente lite or for acting as his own attorney and solicitor during said time, except as provided in the order of January 28, 1936, at which time he was directed to pay to himself on account of fee to be eventually ascertained and fixed by this court the sum of $500.00 per month beginning November 11, 1935.

That your petitioner was appointed permanent receiver on the 8th day of February, 1936, and that no fee was fixed at said time to compensate him

for said services, and that he has received no advances or compensation on account during the time he served as said permanent receiver except the sum of $500.00 per month, which he was directed by the order of January 28, 1926, to pay to himself on account of fee to be eventually ascertained and fixed by this Court.

That the total sum received by your petitioner on account of fees to be fixed by this Court as receiver pendente lite and for acting as his own attorney and solicitor, and as permanent receiver, is the sum of $8,333.32.

That your petitioner served as co-ancillary receiver pendente lite in the proceedings in Wyoming, for which no [90] compensation was fixed by the court, it being stipulated that your petitioner's compensation would be fixed by this Court as the Court of Primary jurisdiction.

That your petitioner was appointed and has served as co-ancillary receiver in the State of Idaho and is still serving in that capacity, with directions to close said ancillary receivership in Idaho as of September 1, 1937; that no fee or compensation was fixed or has been received to compensate your petitioner for his services, it being understood that he would be compensated as his fee fixed by this court as the court of primary jurisdiction.

That during all of said time your petitioner has utilized in behalf of the receivership estate his own law offices and library, and during the period between April 20, 1934, and November 30th, 1935, he utilized the services of his office stenographer.

Wherefore your petitioner prays that this final report and account and his conduct in the premises be approved and allowed; that this Honorable Court fix an equitable and reasonable fee as compensation for the services of your petitioner in the premises; that a lien upon the assets of the defendant corporation be established in favor of your petitioner for such compensation as may be determined by this Honorable Court; that an order be made directing the Receiver of said defendant corporation to pay such sum as may be fixed by this Honorable Court to him for such fee and compensation for said services after deducting therefrom the amounts paid to him on account which were made pursuant to the order of this Court; that he be discharged from further duty in the premises and his bond as such Receiver be exonerated;

That this court fix a date for a hearing on said final report and application for compensation and discharge and exoneration of bond, and that due notice of the filing of this [91] final report and application for such compensation and discharge and exoneration of bond be given in the form and manner fixed by this Court and in accordance with equity practice; that upon the hearing thereof, such report be approved and such allowance for services rendered by petitioner to the receivership estate as the Court may deem equitable and reasonable in the premises be made and declared a lien upon the receivership estate and ordered paid by the receiver of said estate, and that he be discharged and his bond exonerated.

For such other and further orders and relief as to the Court may seem meet and proper in the premises.

HENRY S. McCLUSKEY
Petitioner. [92]

State of Arizona,
County of Maricopa—ss.

Henry S. McCluskey being first duly sworn on oath deposes and says: That he is the petitioner above named; that he has read the above and foregoing account and report and petition, knows the contents thereof, and that the same is true, to the best of his knowledge, information and belief.

HENRY S. McCLUSKEY

Subscribed and Sworn to before me this 2nd day of September, 1937.

(Seal) THOMAS W. NEALON
Notary Public

My Commission Expires: Sept. 9, 1937. [93]

EXHIBIT No. I.

ASSETS IN ARIZONA

	Ledger Bal. Apr. 1, 1937		Deductions for possible losses
Cash, bonds, warrants, accrued interest	$233,346.10		
Real estate loans, active	96,860.44		$ 210.57
Real estate loans foreclosed subject to redemption	201,943.97	(25%)	50,485.99
Real estate loans foreclosed, suits pending	42,242.67	(20%)	8,448.53
Real estate loans, H.O.L.C. salvage	5,019.62		1,019.62
Real estate owned	300,627.74	(20%)	60,125.55
Real estate sold on conditional sale contracts	17,729.61		
Judgment in tax suit	68.72		
Judgment in Foerst suit	121.05		
Funds representing unclaimed checks	267.86		
Choses in action considered good	50,516.27		
Property in Nebraska carried as Arizona asset	10,820.33	(40%)	4,328.13
Promissory notes secured by certificates	324,700.83		
Promissory notes secured by mortgages on real property situated outside of Arizona, the physical possession of the notes coming to petitioner on Nov. 30, 1935	286,635.32	(40%)	114,654.13
Accounts Receivable, Canada	15,000.00		
Furniture and Fixtures	11,941.36	(75%)	8,956.02
	$ 1,597,841.89		$248,228.54

Assets per ledger balance of Apr. 1, 1937	$ 1,597,841.89
Deductions for possible losses	248,228.54
	$ 1,349,613.35

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EXHIBIT No. II.

ASSETS IN STATES OTHER THAN ARIZONA

	Ledger Bal. Nov. 30/35		Deductions for possible losses
Cash and bonds	$225,833.87		
Real estate loans (mortgages)	243,849.09	(40%)	$ 97,539.64
Conditional sales contracts	67,034.58	(40%)	26,813.83
Real estate owned	594,449.85	(40%)	237,779.94
Furniture and fixtures	4,061.95	(75%)	3,046.46
	$ 1,135,229.34		$365,179.87

Assets per ledger balance November 30, 1935	$ 1,135,229.34
Deductions for possible losses	365,179.87
	$ 770,049.47

[95]

EXHIBIT No. III.

DISBURSEMENTS FOR REPAIRS & IMPROVEMENTS

Real Estate Loans—11-30-35 to 4-1-37—Arizona

REL No.	Name of Property	Location	Amount
378	Munoz Property	Nogales	$ 16.33
401	Rollins Property	Mesa	63.61
608	Cohen Property	Miami	110.09
1006	Green Property	Chandler	21.21
1052	Ham Property	Somerton	11.30
1053	Ham Property	Somerton	33.05
1363	Phillip Property	Chandler	5.00
1436	Templeton Property	Casa Grande	12.20
1462	Brechan Property	Tempe	15.98
1467	Hammels Property	Glendale	65.50
1485	Jones Property	Glendale	14.00
1538	Hall Property	Phoenix	69.03
1611	Ratcliff Property	Phoenix	99.50
1668	Tuttle Property	Somerton	17.65
1682	Kuhne Property	Phoenix	21.69
1698	Nelson Property	Phoenix	209.17

Disbursements for Repairs and Improvements—Real Estate Loans—11-30-35 to 4-1-37—Arizona—(Continued)

REL No.	Name of Property	Location	Amount
1700	Nelson Property	Phoenix	29.00
1715	Shumway Property	Mesa	7.66
1740	Edmondson Property	Phoenix	11.51
1771	Garcia Property	Phoenix	58.50
1772	Mitchel Property	Phoenix	60.64
1799	Owens Property ½	Mesa	4.02
1854	LeBaron Property	Phoenix	68.87
2109	Carlson Property	Phoenix	28.84
2131	Pinson Property	Phoenix	43.27
2153	Spain Property	Welton	81.00

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2714	Davis Property	Phoenix	$ 175.87
2180	Davis Property	Phoenix	68.28
2205	Davis Property	Phoenix	90.06
2276	Lockhart Property	Phoenix	285.00
2282	Greenlee Property	Phoenix	72.76
2285	Moser Property	Phoenix	69.99
2287	Hutson Property	Flagstaff	1,478.57
2301	Greenlee Property	Phoenix	43.50
2333	Beneficial Inv. Co.	Phoenix	288.71

Total Disbursements for Repairs and Improvements on Real Estate Loans in Arizona.....$3,751.36

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DISBURSEMENTS FOR REPAIRS & IMPROVEMENTS

Real Estate Owned—Arizona—11-30-35 to 4-1-37

REO No.	Name of Property	Location	Amount
40	Peterson Property	Mesa	$ 5.36
120	Phx. Land & Inv. Co.	Phoenix	3.59
125	Williams Property	Somerton	29.40
126	Williams Property	Somerton	4.69
127	Williams Property	Somerton	8.59
128	Williams Property	Somerton	3.00

Disbursements for Repairs & Improvements—Real Estate Owned—Arizona—11-30-35 to 4-1-37—(Continued)

REO No.	Name of Property	Location	Amount
131	Martin Property	Somerton	21.96
132	Crider Property	Casa Grande	6.53
133	Hamilton Property	Casa Grande	222.86
142	Horwath Property	Phoenix	30.77
153	Peterson Property	Chandler	81.07
176	Harvey Property	Mesa	64.22
180	Ratcliff Property	Casa Grande	29.53
181	Stanton Property	Inspiration	8.61
182	Shoemaker Property	Miami	2.00
183	Wolfe Property	Phoenix	13.37
185	Hatch Property	Taylor	83.64
187	Lang Property	Chandler	52.53
190	Morrell Property	Phoenix	285.17
191	Belbaze Property	Phoenix	257.13
192	Parrish Property	Phoenix	86.06
193	Weston Property	Phoenix	93.07
194	Bohannon Property	Phoenix	37.51
195	Taylor Property	Phoenix	61.72
196	Burnett Property	Chandler	5.75
197	McElrath Inv. Co. Propt.	Phoenix	26.19
199	Erpenbach Property	Phoenix	54.93

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200	Caldwell Property	Phoenix	$ 57.91
201	Chambers Property	Phoenix	125.89
202	Chambers Property	Phoenix	23.00
203	Chambers Property	Phoenix	131.26
205	Arnold Property	Yuma	8.50
292	Smith Property	Phoenix	4.50
305	Schofield Property	Yuma	9.45
308	Mahoney Property	Phoenix	5.00
312	Binion Property	Chandler	11.75
314	Hillman Property	Phoenix	32.65
316	Rogers Property	Phoenix	52.31
317	Schultz Property	Phoenix	79.00
325	Anderson Property	Chandler	50.65
331	Beals Property	Phoenix	494.57
333	Greer Property	Phoenix	194.70
335	Fram Property	Glendale	54.00
338	Flake Property	Phoenix	18.50
339	Flake Property	Phoenix	58.61

Disbursements for Repairs & Improvements—Real Estate Owned—Arizona—11-30-35 to 4-1-37—(Continued)

REO No.	Name of Property	Location	Amount
340	Anderson Property	Chandler	24.46
345	Larsen Property	Phoenix	102.15
347	Phx. Land & Inv. Co.	Phoenix	460.00
349	McDonald Property	Tucson	1.00
350	Field Property	Nogales	337.30
353	Fordham Property	Casa Grande	20.50
354	Taylor Property	Phoenix	64.42
355	Nelson Property	Phoenix	12.09
356	Tempe—Lukin Property	Tempe	5.42
357	Cambridge Property	Phoenix	132.50
			[99]
358	Riggins Property	Phoenix	122.18
359	Rohe Property	Winslow	14.50
360	Merrifield Property	Winslow	32.63
361	Jett Property	Phoenix	65.28
362	Mytinger Property	Tucson	25.45
363	Reece Property	Chandler	25.50
364	Jones Property	Glendale	47.50
365	Tuttle Property	Somerton	2.50
367	Welch Property	Phoenix	9.00

Total Cost Repairs, Maintenance, Improvements on Real Estate owned $4,495.88

DISBURSEMENTS FOR REPAIRS & IMPROVEMENTS

Real Estate Subject to Redemption—Arizona
11-30-35 to 4-1-37

RESR No.	Name of Property	Location	Amount
1462	Brechen Property	Tempe	$.77
1538	Hall Property	Phoenix	25.05
1590	Stephensen Property	Phoenix	56.00
1682	Kuhne Property	Phoenix	40.75
1698	Nelson Property	Phoenix	31.65
1700	Nelson Property	Phoenix	37.04
1740	Edmondsen Property	Phoenix	2.50
1772	Mitchell Property	Phoenix	7.16
1854	LeBaron Property	Phoenix	3.50

Disbursements for Repairs and Improvements—Real Estate Subject to Redemption—Arizona—11-30-35 to 4-1-37—(Continued)

RESR No.	Name of Property	Location	Amount
2153	Spain Property	Wellton	49.47
2174	Davis Property	Phoenix	17.04
2180	Davis Property	Phoenix	34.44
2205	Davis Property	Phoenix	28.53
2287	Hutson Property	Flagstaff	70.68
2288	Hutson Property	Flagstaff	37.41

Total Disbursements for Repairs & Improvements on R.E.S.R. Arizona $ 441.99

Resume:

Total Disbursements	REL	$3,751.36
" "	REO	4,495.88
" "	RESR	441.99
		$8,689.23

[101]

EXHIBIT No. IV

H. S. McCluskey, Receiver
Intermountain Building & Loan Association
A Corporation of Utah
313 Luhrs Building
Phoenix, Arizona

To the Certificate-Holders:

Numerous letters asking for a statement of the progress which is being made in the liquidation of the affairs of the Intermountain Building and Loan Association have been received. In order to respond to your letter, as well as others, as economically as possible, this answers the questions, propounded in your letter, as well as some that have been asked by other creditors.

Exhibit No. IV.—(Continued)

The United States District Court for the District of Arizona entered its decree on the 6th day of January, 1937, confirming the appointment of the undersigned as Receiver. As soon as the mechanics of the situation will permit, I propose to file a report in the United States District Court setting forth in detail the progress of the administration to date.

Ancillary receivers have been appointed in all states concerned except California and Oregon, where litigation is still pending and undetermined.

In Arizona, either we have been collecting the balance due on mortgages or foreclosing the same. In all cases where it has been at all possible, we have secured rental assignments of the property where the mortgages are in default. We have rehabilitated the properties, wherever necessary, and practically all of the same are now rented and occupied. We have redeemed practically all the properties which were sold for taxes. We have also sold and disposed of a number of properties and are selling others on contract and will dispose of the remaineder as rapidly as possible.

It is impossible to fix any date upon which a dividend may be paid for several reasons, among which are: first, the litigation pending in California and Oregon, which must first be disposed of before the relative rights of claimants may be determined; second, the fact that less than 50% of the certificate holders have filed their claims, partly due to the aforesaid undetermined litigation; third; the time

Exhibit No. IV.—(Continued)

required by the court to determine the rights of certificate holders after the time for filing same has expired; fourth, the further time required to secure purchasers for the property owned by the Association.

If this letter contains a blank claim it is evidence of the fact that our records indicate that you are one of the certificate holders who has not yet filed a claim in Arizona, and you should return your claim supported by your passbook and certificate on or before February 22, 1937, which is the final date claims may be filed, unless the court shall extend the time. If you have filed your claim in another state, show this on your claim.

Very truly yours,

H. S. McCLUSKEY,

Receiver, Intermountain Building and Loan Association (Utah) [102]

Re: Certificate No.

In response to your recent inquiry, it is imperative that you file a claim with the undersigned as Receiver of this Association if you are to participate in the assets of the Association in the possession (or which may come into the possession) of the undersigned as Receiver of the above Association.

It is imperative that you attach your Certificate and Pass Book to the claim. If your Certificate and Pass Book are filed with the Receiver in Wyoming, or the Building and Loan Commissioner in Cali-

Exhibit No. IV.—(Continued)

fornia, or on file in this office as security for a loan or withdrawal, state the facts on your claim, and it will be a matter for the Receivers to work out the details with their respective Courts. If your Certificate or Pass Book is lost, make affidavit setting out fully all of the facts and information concerning the same.

It is impossible to fix any date on which dividends may be paid. Litigation pending in California, Oregon and Wyoming must first be determined, and a Court of competent jurisdiction must determine the relative rights of the several classes of certificate holders.

We are also unable to fix any value the claims may have and know of no market value.

Enclosed is another form for making claim in the event you have mislaid your other one, and such other additional information as we have which may be of aid to you in the premises.

Very truly yours,

H. S. McCLUSKEY,

Receiver for Intermountain Bldg. & Loan Ass'n (of Utah)

HWM:McG

Encl. [103]

Exhibit No. IV.—(Continued)

I am the duly appointed, qualified and acting Receiver of the Intermountain Building and Loan Association, an Utah Corporation, having been so appointed by the United States District Court for Arizona on the 20th day of April 1934, which order, upon appeal, was duly affirmed.

Among the assets in my possession as such Receiver is a promissory note signed by you, which is secured by a real estate mortgage.

This is to notify you that payments upon said note are to be paid to me as Receiver of the Intermountain Building and Loan Association, at my office No. 313 Luhrs Building, Phoenix, Arizona.

My attorneys advise me that payments to anyone else would be ineffectual and would not relieve you from liability for the payments as I am the Receiver for said corporation. Therefore, I am notifying you that I am the only proper person to whom the payments should be made.

Please acknowledge receipt of this letter.

Yours very truly,

.

Receiver of Intermountain Building and Loan Association, an Utah corporation.

REG:RRR [104]

In the Matter of the Estate of
Intermountain Building and Loan Ass'n
An Utah Corporation, Insolvent

In response to your letter of inquiry, according to the corporation's record of your account as

Exhibit No. IV.—(Continued)

turned over to me you are entitled to file a claim in the amounts, and for the class of certificates shown below:

	Number of Pass Book or Certificate	Amount Paid In.
Installment Accumulative Certificate		
Installment Accumulative Certificate		
Installment Accumulative Certificate		
Coupon Certificate		
Fully Paid Certificate		
Pass Book Savings Certificate		
Extra Deposits		
Other Claims (not listed above)		
Total.....		$.....

This information is given to you without prejudice as to the rights of the receiver to correct the same when the account is audited.

Please Return This Form With Your Claim and Certificate, or other evidence of indebtedness.

(Please do not write below this line)

313 Luhrs Building,
Phoenix,
Arizona.

HENRY S. McCLUSKEY,
Receiver of Intermountain Building and Loan Association, an Utah corporation, Insolvent.

By

Date.....

[105]

Exhibit No. IV.—(Continued)

Dear

Re: Certificate No.

In answer to your letter I wish to advise that it is not yet possible to forward claim blanks in order that you may file claim for dividends on your certificate. On account of the Association operating in several states, it will be necessary to get judicial determination as to the relative rights of the various types of certificates outstanding, and also as to their relative rights in the respective states in which the certificates were sold.

There will be no definite information available in this connection until all these matters have been adjudicated, at which time each certificate holder will be properly advised.

Some questions have arisen in connection with the possibility of transferring the value of certificates on real estate loans or the purchase of real estate owned by the Association, however, judicial determination has not yet been received. It appears this procedure may not be approved by the Court on account of the preference that would be shown to the individual certificate holder over others similarly situated.

It is impossible at this time to give you an estimate of the amount of dividends which will be paid on account of various conditions affecting liquidation in the respective states.

Until you hear further, it will not be necessary

Exhibit No. IV.—(Continued)

to write in, unless you so desire, as all information will be sent you when available.

Yours very truly,

H. S. McCLUSKEY

Receiver, Intermountain Building and Loan Association (of Utah) [106]

Dear Certificate Holder

Re: Certificate No.

In answer to your letter wish to advise that it is not yet possible to forward claim blanks in order that you may file claim for dividends on your certificate. On account of the Association operating in several states, it will be necessary to get judicial determination as to the relative rights of the various types of certificates outstanding, and also as to their relative rights in the respective states in which the certificates were sold.

There will be no definite information available in this connection until all these matters have been adjudicated, at which time each certificate holder will be properly advised.

Some questions have arisen in connection with the possibility of transferring the value of certificates on real estate loans or the purchase of real estate owned by the association, however, judicial determination has not yet been received. It appears this procedure may not be approved by the Court on account of the preference that would be shown to the individual certificate holder over others similarly situated.

Exhibit No. IV.—(Continued)

It is impossible at this time to give you an estimate of the amount of dividends which will be paid on account of various conditions affecting liquidation in the respective states.

Until you hear further it will not be necessary to write in, unless you so desire, as all information will be sent you when available.

Very truly yours,

.....

H. S. McCLUSKEY

.....

G. A. MAUK

H. S. McCluskey & G. A. Mauk. Co-Receivers of Intermountain Building and Loan Association (of Utah) [107]

I was appointed Receiver of the Intermountain Building and Loan Association, a Utah Corporation, April 20th, 1934. The appointment was affirmed by the United States Circuit Court of Appeals of the 9th District at San Francisco, and Certirori was denied by the United States Supreme Court. The Mandate of the United States Supreme Court and of the United States Circuit Court of Appeals was spread upon the minutes of the District Court of Arizona, on December 2, 1935, and I have now taken over the affairs of this Association in Arizona. An order to show cause why the Receivership should not be made permanent has been entered and hearing thereon set for January 6, 1936, in the United States District Court of Arizona.

In checking over the records in this office, I find

Exhibit No. IV.—(Continued)

that you are the mortgagor of a piece of property upon which we hold a promissory note and mortgage, and that the same is in default.

It is our promise to liquidate this trust as soon as possible. Your default places you in the position of having the mortgage on this property foreclosed. May I not suggest that you give this matter your immediate attention and advise what you propose to do with reference to this account.

In this connection, if you have previously filed a Home Owners' Loan Corporation application, it would be advisable to file a supplemental application. In this connection I have retained the services of one of the former officers of the Home Owners' Loan Corporation to aid in preparing the necessary papers, forms, etc., and would suggest that you contact him at the office of the Receiver at 313 Luhrs Building, Phoenix, Arizona.

Very truly yours,

H. S. McCLUSKEY,
Receiver for Intermountain
Bldg. & Loan Assn. of Utah

McG:McG [108]

Dear Sir or Madam:

Enclosed please find copy of order made by the United States District Court in and for the District of Arizona fixing the time within which claims must be filed against the Intermountain Building & Loan Association, an Utah corporation, and limiting the time for filing to November 22, 1936.

Exhibit No. IV.—(Continued)

We are also enclosing a form of claim for your convenience. This should be filled out according to the instructions contained on the back of the claim. You investment certificate and pass book must be attached thereto and the claim sworn to before a Notary Public or some other officer duly authorized to administer oaths. The claim must be mailed to or filed with Mr. Henry S. McCluskey, Receiver of Intermountain Building & Loan Association, 313 Luhrs Building, Phoenix, Arizona.

The instructions contained on the back of the claim are intended to aid you in the preparation of your claim, as the proper filling out of all claims is absolutely necessary to protect you and other bona fide holders from being defrauded by means of spurious and false claims.

If the claim is in proper form and filed, the same will be allowed for the proper amount. In case of a rejection of any claim, the claimant will be notified of the rejection, and the question of the allowance will then be determined by the Judge of the United States District Court, in and for the Federal District of Arizona.

This claim should be in the hands of the Receiver before the 22nd day of November, 1936, in order that the same might be allowed, and this is

Exhibit No. IV.—(Continued)

necessary before any payments can be made to any claimant.

Very truly yours,

HENRY S. McCLUSKEY,

Receiver of Intermountain Building & Loan Association, an Utah corporation. 313 Luhrs Building, Phoenix, Arizona. [109]

February 27, 1936.

Re:

Dear Mr.:

The undersigned have been duly appointed as Co-Receivers of the Intermountain Building and Loan Association, and are now in a position to, and must, liquidate the assets of the above mentioned Association. Among the list of assets is the property in which you are now residing, and since the property is for sale, we would like to give you an opportunity to offer to purchase the same if you so desire. The offer must be cash, or at least a substantial cash payment and short term contract.

It is not the purpose of this letter to convey the idea to you that you must vacate the premises, but to advise that we are in a position to give your offer full consideration, should you desire to make an offer to purchase the property.

Kindly address your offers to Receivers, Intermountain Bldg. and Loan Association, attention

Exhibit No. IV.—(Continued)

Mr. Haskell Welch, 313 Luhrs Building, Phoenix, Arizona.

Very truly yours,
H. S. McCLUSKEY &
G. A. MAUK,
Co-Receivers, Intermountain Bldg. & Loan Assn. (of Utah)

.....
H. S. McCLUSKEY
.....
G. A. MAUK

HW:MW [110]

December 2nd, 1935

To the Creditors of the Intermountain Building and Loan Association:

The decision of Judge Jacobs of the United States District Court for Arizona appointing me as Receiver for the assets of the Intermountain Building and Loan Association in Arizona has been confirmed by the Circuit Court of Appeals and the Writ of Certiorari denied by the United States Supreme Court.

On Monday, November 26, 1935, I began taking over physical possession of the assets of the Intermountain Building and Loan Association in Arizona, from the Utah Bank Commissioner. It will probably be several days before the transfer is complete.

I had a long discussion of the entire matter of

Exhibit No. IV.—(Continued)

this trust with Judge Jacobs on Tuesday of this week and in order to expedite the administration of the trust and to effect, if possible, harmonious relations in the administration of the trust with those in charge of the properties in the several states he has authorized me to visit the several states in which the association owns property or has assets.

I expect to begin this trip within the course of the next ten days and hope to be able by the first of January to begin converting a portion of the assets through the agency of the Home Owners' Loan Corporation.

It is impossible to give any estimate of the value of this estate at this time. It will be necessary to appraise the properties owned by the association and upon which the association holds mortgages. It is safe to say, however, that the actual value of the properties will in the aggregate prove to be substantially less than the book values.

It is my hope that I shall be able, as a result of a trip to the several states, to effect agreements which will facilitate the rapid liquidation of this trust and at considerably less expense, so that we may put it in shape to pay dividends at the earliest possible date.

It is my understanding that there are a number of different classes of certificates outstanding which contain different provisions and it will be necessary to determine the relative rights of the several

Exhibit No. IV.—(Continued)

classes of certificates in and to the assets of the association. [111]

With reference to the rights of the holders of the different classes of certificates in and to the assets of the association I understand that it makes no difference where the holder of that class of certificate resides, whether it be in Utah, Oregon or Arizona or any other state. The rights of the Arizona certificate holder in a given class will be equal with that of a certificate holder in Utah, Oregon and any other state and the rights of the Oregon certificate holder of the same class will be equal with that of the certificate holder in Arizona, and that all certificate holders of a given class have an equal claim upon all of the property owned by the association, no matter where situated.

There may be one possible exception to the statements in the above paragraph which will have to be determined as a matter of law. That is the matter concerning a certain class of certificates in the State of California. Otherwise, from such information as I now have available, it would seem that equity indicates that the assets of this association should be distributed equally among all of the creditors of the association wherever situated according to the relative standing of the several classes of the certificates.

It is with this end in view that I propose to solicit the cooperation of those in charge of the property in other states with a view of limiting litiga-

Exhibit No. IV.—(Continued)

tion to a minimum and reducing the assets of this trust to cash as soon as possible.

There are a great many letters on file from certificate holders from all sections of the country asking numerous questions as to the status of this trust. If we undertake to answer all of the letters separately it will consume a great deal of time which can more profitably be devoted to the administration of the trust.

I expect, as soon as I can get the matter of liquidating the properties upon which applications to the Home Owners' Loan Corporation have been made taken care of, to give my attention to calling for the filing of claims and the determination of the relative standing of the several classes of certificates.

In order that I may be protected from paying claims based upon forged or stolen certificates I shall probably require proof of a certain nature to be filed, the nature of this proof having not yet been determined.

If you are one of the creditors who have written me concerning this matter I trust that you will accept this letter as response to your communication and that you will excuse the failure to answer your letter separately.

Yours very truly,

H. S. McCLUSKEY,

Receiver For Intermountain

Building and Loan Ass'n.

[112]

EXHIBIT No. V.

REAL ESTATE LOANS AND REAL ESTATE OWNED REFINANCED THROUGH HOME OWNERS LOAN CORPORATION

On the following loans refinanced through H. O. L. C., the full value of the securities as determined by appraisals made by officers of H. O. L. C. was obtained, and there was no book loss thereon:

Loan No.	Name	Principal & Advances	Cash & Bonds from H.O.L.C.	Salvage from Mortgagors Cash	Salvage from Mortgagors Notes, etc.
708	Wheelahan	375.87	$ 436.28		
742	Smith	362.23	396.09		
1057	Fairall	377.81	420.79		
1082	Woods	1,549.77	1,324.07	$ 100.00	$ 270.00
1219	Morales	1,501.71	1,532.99		
1274	Stines	977.60	1,237.53		37.14
1286	Cage	2,047.56	2,287.55		
1334	Strawbridge	1,266.78	1,532.95		
1417	Rhoades	397.17	438.31		
1423	Pettit	1,179.80	1,276.86		
1446	Moore	857.61	853.92	30.95	64.95
1500	Ball	810.91	937.18	21.75	
1510	Renfro	888.21	940.87		
1647	Huff	269.28	305.43		
2145	McLean	1,732.46	1,900.89		
2146	Beasley	1,734.61	1,911.63		
2172	Kelsey	2,881.05	2,998.40		
2234	Flower	757.17	782.05		173.97
2250	McCutcheon	1,592.84	1,134.87		520.00
2328	Kelly	978.28	1,147.42		
		$22,538.72	$23,796.08	$ 152.70	$1,066.06
					152.70
				Salvage	$1,218.76

[113]

On the following loans and real estate owned refinanced through H. O. L. C., the full value of the securities as determined by appraisals made by officers of H. O. L. C. was obtained, but a book loss thereon is shown:

LOANS

Loan No.	Name	Book Balance*	Cash & Bonds from H.O.L.C.	Salvage from Mortgagors Cash	Salvage from Mortgagors Notes, etc.	Book Loss On Realization
748	Messer	$ 778.20	$ 661.44		$ 101.90	$ 14.86
1058	Ollason	3,356.07	518.02	$ 125.00	775.00	1,938.05
1159	Mason	1,717.08	1,338.83		200.00	178.25
1579	Hagan	1,465.53	1,012.11			453.42
1586	Dobbins	371.99	171.79			200.20
1665	Palmer	1,468.19	846.99			621.20
1861	Brock	1,221.02	918.85		200.00	102.17
1871	Burquez	2,197.16	847.77		420.00	929.39
1914	Cormack	1,566.38	940.48			625.90
2160	Cress	7,689.65	4,039.78			3,649.87
2169	Schewel	3,007.89	1,532.41		580.00	895.48
2206	Fischer	3,449.74	1,399.63			2,050.11
2214	Ingram	2,259.71	1,940.28		100.00	219.43
2221	Stone	2,239.07	2,053.92			185.15
2272	Deal	2,563.27	1,699.73		250.00	613.54
2292	Stanley	2,281.97	1,922.48		250.00	109.49
2283	Tamm	7,064.54	3,348.40	300.00	250.00	3,166.14
2300	Condron	6,655.23	4,587.25		900.00	1,167.98
2304	Campbell	2,825.96	1,885.78		274.22	665.96
2312	Lucas	1,778.98	1,358.98		370.00	50.00
		$55,957.63	$33,024.92	$ 425.00	$4,671.12	$17,836.59
					425.00	
				Salvage	$5,096.12	

REAL ESTATE OWNED

360	Merrifield	$ 3,973.84	$ 2,897.57			1,076.27
341	Adams	939.23	800.00		131.00	8.23
		$60,870.70	$36,722.49		$5,227.12	$18,921.09

* These figures include rents and interests collected, interest adjudications made, clerk's fees on court deposits, etc.

EXHIBIT V.—(Continued)

The following assigned certificates were taken as additional salvage on above loans:

Loan No.	Name	Cert. No.	Company Issuing	Amt. of Claim	Amt. Rec'd at Time of Closing Loans	Amt. Rec'd Subsequent to Closing Loans
1058	Ollason	A-2674	Intermountain Bldg. & Loan Ass'n of Arizona	$ 334.68*	$ 107.10	$ 16.72
1446	Moore	A-3778	Intermountain Bldg. & Loan Ass'n of Arizona	96.77		4.84
1082	Woods	A-2757	Intermountain Bldg. & Loan Ass'n of Arizona	628.01*		
2172	Kelsey	A-13707				
		A-17271	First Nat'l Bldg. & Loan Ass'n	477.31	186.18	19.09
REO 360	Merrifield	05-18999	Intermountain Bldg. & Loan Ass'n of Utah	107.28		
2169	Schewel	05-18930	Intermountain Bldg. & Loan Ass'n of Utah	500.50*		
				$2,144.55	$ 293.28	$ 40.65

* Dividends from these certificates to be applied to payment of notes and second mortgages.

RESUME

Cash and Bonds from H.O.L.C. on REL's showing no book loss	$23,796.08	
Cash and Bonds from H.O.L.C. on REL's showing book loss	33,024.92	
	$56,821.00	
Cash and Bonds from H.O.L.C. on REO's	3,697.57	
Total cash and bonds		$60,518.57
Salvage from Mortgagors on REL's showing no book loss	1,218.76	
Salvage from Mortgagors on REL's showing book loss	5,096.12	
	6,314.88	
Salvage from Mortgagors on REO's	131.00	
Total Salvage	$ 6,445.88	
Amount received on Certificates taken as additional salvage at time of consummation of settlement with H.O.L.C.	293.28	
Total Salvage		6,739.16
		$67,257.73
Additional amount received subsequent to consummation of settlements with H.O.L.C.		40.65
		$67,298.38

AMOUNTS PAID ON SALVAGE NOTES TAKEN

Loan No.	Name	Amounts Received on Salvage Notes
748	Messer	$ 15.00
1058	Ollason	140.00
1082	Woods	121.40
1159	Mason	60.00
1274	Stines	5.00
1871	Burquez	5.00
2169	Schewell	14.00
2214	Ingraham	14.00
2234	Flower	61.04
2250	McCutcheon	40.00
2272	Deal	50.00
2283	Tamm	75.00
2292	Stanley	40.00
2304	Condron	270.00
2312	Campbell	10.00
		$ 920.44
REO341	Adams	44.61
		$ 965.05

[116]

EXHIBIT No. VI.

ITEMIZATION ON LOANS PAID IN FULL

Nov. 30, 1935 to Mar. 31, 1937

Loan No.	Name	Book Balance 11-30-35	Adjustment Refigure	Amount Received
318	Clara Priest	$ 449.67	$ None	$ 472.80
359	F. Ellsworth & Sons	739.41	79.36	834.17
653	Joseph E. Hood	107.56	103.48	31.90
667	Elmer C. Schneider	685.94	113.76	572.18
699	Florence B. Cramer	272.42	None	275.78
755	Pauline Kelsey	118.60	None	118.60
813	Helen M. Cole	368.65	107.30	261.35
842	Mary E. Elkins	1,831.49	146.34	2,013.40
957	H. P. Rogers	299.67	33.92	279.25
1007	Dr. K. M. Gilbert	651.09	32.20	645.01

Itemization on Loans Paid in Full—(Continued)

Loan No.	Name	Book Balance 11-30-35	Adjustment Refigure	Amount Received
1013	J. E. Tresnon	773.32	155.16	669.46
1109	Claude B. Harrison	122.82	150.89*	79.65
1175	Gilbert H. Wheelock	573.06	75.85	523.37
1259	M. Emily Evans	1,888.61	173.82	2,014.67
1386	Maude E. Service	254.09	4.85	268.37
1386	A. E. Dickason	207.88	52.12	182.97
1413	Dan Medigovich	218.59	83.00	152.02
1468	Louis & Grace Ipharr	82.71	75.52	59.00
1632	E. S. Westover	643.41	73.54	630.00
1706	Miami Free Public Library	223.12	35.42	201.62
1712	Frances J. Fischer	327.04	68.85	262.97
1727	Harry Carter	2,621.99	226.09	2,598.79
1885	Culp Brothers	725.44	82.17	708.04
2171	Horace L. Kincaid	439.28	None	453.96
2296	Lucy V. Spencer	338.08	11.85	334.72
		$14,963.94	$1,886.49	$14,644.05
	Improper charges	1,886.49		
	Actual Value 11/30/35	$13,077.45		

* On this account there was a refund due to excessive interest paid.

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EXHIBIT No. VII.

REAL ESTATE LOANS COMPROMISED

The following loans compromised were settled without showing a book loss:

REL No.	Name	Principal Due	Amount Received
2168	Garrett	$ 4,932.57	$ 5,000.00
2188	Price	1,741.07	1,950.00
2313	Corroneous	5,696.39	6,000.00
1170	Wilson	980.48	1,000.00
		$13,350.51	$13,950.00

The following loans compromised showed a book loss:

REL No.	Name	Principal Due	Amount Received	Loss on Realization
1051	Cunningham	$ 757.70	$ 600.00	$ 157.70
1054	Carson	784.97	600.00	184.97
2130	Giragi Bros.	7,031.62	4,829.87	2,201.75
2170	Williams	968.20	919.80	48.40
2175	Leonard	6,349.47	3,619.80	2,729.67
		$15,891.96	$10,569.47	$ 5,322.49

Total amount received....$13,950.00
10,569.47

$24,519.47

Allowances and adjustments were made on the following loans:

1457	Wm. G. Tisdale	$ 57.71
2127	Georgia Bly	41.24
		$ 98.95

LOANS FOR WHICH DEEDS WERE TAKEN

Loan No.		To REO No.	Bal. 11/30/35	Refigure Adj.	Bal. 3/31/37
1340	Scorse	368	$ 2,482.68	$ 247.17	$ 1,863.03
1448	Jones	364	1,357.85	104.77	1,502.51
1668	Tuttle	365	2,313.53	161.32	2,248.07
2302	Reece	363	4,912.62		4,939.25
2109	Carlson	369	4,450.10	24.67	4,190.62
			$15,516.78	$ 537.93	$14,743.48*

* Taxes, insurance and upkeep have in addition to this has been paid.

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EXHIBIT No. VIII.

LIST OF FORECLOSURES UPON WHICH SHERIFF'S CERTIFICATES OF SALE WERE ISSUED FROM NOV. 30, 1935 TO MAR. 31, 1937

Loan No.	Name	Total Amt. of Bid	Attorney's Fees Included in Judgment	Deficiency Judgments
401	Rollins, Chas.	$3,114.73	$ 265.48	$
608	Cohen, Sam	1,797.44	131.53	1,000.00
711-1073	Darr, J. S.	1,429.68	100.00	100.00
756	Ward, Homer B.	2,185.81	100.00	*100.00
758	Carter, Bedford	706.04	100.00	100.00
766	Journigan, Julian	2,039.55	143.01	1,000.00
1006	Vest, Robert H.	545.62	50.00	
1052-1053	Ham, A. S.	4,041.68	190.00	
1271	Lee, Charley	1,410.41	124.09	
1363	Caudill, W. S.	778.88	100.00	
1436	Templeton, Phebe	2,748.00	175.00	
1462	Brechan, Myrtle	3,924.35	354.16	*100.00
1485	Yoakum, W. E.	4,386.05	250.00	
1538	Hall, M. D.	3,410.62	294.38	
1590	Stephenson, Blanche B.	2,276.30	201.49	*500.00
1611	Bailey, L. A.	2,031.51	182.22	
1682	Kuhne, Lue Ethel	1,411.66	140.08	149.80
1698	Nelson, George	2,026.31	177.95	
1700	Nelson, George	1,134.38	100.00	
1708	McClothlin, Edgar	1,362.85	119.56	
1740	Edmondson, Marcel	3,146.55	283.27	
1771	Nelson, George	1,451.72	127.00	
1772	Nelson, George	1,450.35	129.25	
1799	Owens, B. S.	2,505.11	217.20	
1854	LeBaron, Conway	1,309.67	116.58	
1925	Willis, Clarence	1,931.54	125.34	1,000.00
1088	Rea, Dionicio	616.31	100.00	100.00
2131	Pinson, Martin	3,304.30	250.00	

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2153-2154	Spain, Lawrence	36,973.60	1,758.16	
2174	Davis, Wright	3,049.40	250.00	
2177	Crump, Virginia	17,870.57	500.00	3,170.48
2180	Davis, Wright	3,693.69	333.75	
2204	Short, Catharina	7,948.79	700.00	

Exhibit No. VIII.—(Continued)

List of Foreclosures Upon Which Sheriff's Certificates of Sale Were Issued from Nov. 30, 1935 to Mar. 31, 1937—(Con'td)

Loan No.	Name	Total Amt. of Bid	Attorney's Fees Included in Judgment	Deficiency Judgments
2205	Davis, Wright	3,294.02	296.26	----------
2233	McIntire, Clarence	5,724.58	271.27	----------
2285	Moser, M. R.	3,414.40	306.45	----------
2287-2288	Hutson, Grover	13,842.28	1,195.88	1,200.00
2306	Jacobs, Lulu	5,346.66	481.05	1,000.00
2320	Lincoln Mortgage Co.	5,717.53	1,820.00	14,334.43
2333	Beneficial Invt. Co.	8,871.06	790.23	2,965.26
		$175,124.00	$13,350.64	$26,819.97

Total bid at Sheriff's sale.....$175,124.00
Deficiency allowed in judgment.... 26,819.97

Total amount of judgment.....$201,943.97

* Deficiency judgment released in consideration of putting receiver in immediate possession of premises and rents and relinquishing right of redemption by giving quit claim deed.

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April 7, 1936

The following judgments are of record and unsatisfied upon the records of the Superior Court of Maricopa County, State of Arizona:

37149	Staggs Judgment Docket 17, June 29, 1932.....$	638.80
38680	Cambridge Judgment Docket 18, Aug. 3, 1933	575.39
38770	Payne-Jett Judgment Docket 18, July 13, 1933	253.87
38772	Smith Judgment Docket 18, August 3, 1933....	488.20
35298	Lang Judgment Docket 16, October 13, 1931.... (affidavit for renewal of this judgment was filed August 7, 1936).	303.59
		$2,259.85

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Exhibit No. VIII.—(Continued)
FORECLOSURE SUIT PENDING AS OF
APRIL 1, 1937

Name	R.E.L. No.	Principal Balance Due Apr. 1, 1937	Amount Prayed for in Foreclosure
Munoz, Eleazar	378	$ 483.04	$ 668.99
Holeman, Anna H.	2158	2,918.16	3,852.15
Birkenmeier, Adam	1874	3,423.32	4,961.06
Hales, John G.	2198	1,151.26	1,714.81
Staggs, Clyde Seldon	1467	1,381.43	1,827.04
Greenlee, Dixie (2)	2282-2301	3,121.49	4,797.04
Story, Thomas A.	1160	2,258.02	3,164.49
Williams, John R.	2124	5,059.74	6,987.90
Bettwy, Andrew	1637	2,347.73	3,793.85
Frye, Clara Reuter	727	1,236.93	1,567.18
Farr, Dewey	1212	1,203.17	1,522.62
Ferguson, W. E.	2061	2,229.42	3,071.28
Stines, Chas.	313	871.37	1,046.45
Albert	2289	2,262.70	3,267.81
		$29,947.78	$42,242.67

Note: The amounts prayed for in the judgment include insurance premiums, taxes, principal, cost of foreclosure search, interest and attorney's fees.

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FORECLOSURES FILED IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

Coconino

Case No. 30996—H. S. McCluskey, versus Hutson, Grover C. et al. Foreclosure complaint filed. Gone to judgment. Sheriff's certificate of sale issued. Deficiency judgment taken and later released in consideration of a quit-claim deed from Grover C. Hutson, et ux, to association. Sheriff's deed due April 10, 1937.

Exhibit No. VIII.—(Continued)

Gila County

Case No. 7529-B—H. S. McCluskey versus Birkenmeier, Adam et al. Foreclosure complaint filed. Judgment entered. Went to sale but sale was set aside by court. New execution and order of sale to be issued.

Case No. 7537-B—H. S. McCluskey, versus Carter, Bedford. Foreclosure complaint filed. Gone to judgment. Sheriff's certificate of sale issued. Deficiency judgment taken in the sum of $100.00. Sheriff's deed due August 20, 1937.

Case No. 7531-B—H. S. McCluskey, versus Cohen, Sam, et al. Foreclosure complaint filed. Gone to judgment. Sheriff's certificate of sale issued. Deficiency judgment taken in the sum of $1000.00. Sheriff's deed due August 20, 1937.

Case No. 7672-B—H. S. McCluskey, versus Hales, John G. et al. Foreclosure complaint filed March 24, 1937. Service made on all defendants. Case pending.

Case No. 7566-B—H. S. McCluskey versus Journigan, Julian, et al. Foreclosure complaint filed. Gone to judgment. Sheriff's certificate of sale issued. Deficiency judgment taken in the sum of $1000.00. Sheriff's deed due August 20, 1937.

Case No. 7530-B—H. S. McCluskey, versus Rea, et al. Foreclosure complaint filed. Gone to judgment. Sheriff's certificate of sale issued. Sheriff's deed due August 20, 1937.

Exhibit No. VIII.—(Continued)

Case No. 7538-B—H. S. McCluskey, versus Williams, John R. et al. Foreclosure complaint filed. Judgment entered. Went to sale but sale was set aside by court. New execution and order of sale to be issued.

Case No. 7576-B—H. S. McCluskey versus Wills, Emma, et al. Foreclosure complaint filed. Gone to judgment. Sheriff's certificate of sale issued. Deficiency judgment taken in the sum of $1000.00. Sheriff's deed due August 20, 1937. [123]

Case No. 7528-B—H. S. McCluskey, versus Strine, Charles, et al. Foreclosure complaint filed. Default of defendants entered. This property sold to Cunningham, who now is making the regular monthly payments on the mortgage through the Valley National Bank. Case pending.

Maricopa County.

Case No. 43554-B—H. S. McCluskey, versus Albert, John H. et al. Case pending.

Case No. 43026-D—H. S. McCluskey, versus Bailey, J. A. et al. Foreclosure complaint filed. Gone to judgment. Sheriff's certificate of sale issued. Sheriff's deed due April 27, 1937.

Case No. 43519-D—H. S. McCluskey, versus Beneficial Investment Company, et al. Foreclosure complaint filed. Gone to judgment. Sheriff's certificate of sale issued. Sheriff's deed due June 30, 1937. Deficiency judgment taken in the sum of $2965.26.

Exhibit No. VIII.—(Continued)

Case No. 43817-D—H. S. McCluskey, versus Brechan, Myrtle W. et al. Foreclosure complaint filed. Gone to judgment. Sheriff's certificate of sale issued. Sheriff's deed due July 5, 1937. Myrtle W. Brechan has executed and delivered a quit-claim deed waiving right of redemption.

Case No. 43341-D—H. S. McCluskey, versus Carlson, Anton R. et al. Foreclosure complaint filed. Summons issued. Through negotiations with Mr. G. M. Hill we received a warranty deed from Anton R. Carlson and wife, waiving period of redemption, together with bill of sale to personal property.

Case No. 43165-D—H. S. McCluskey, versus Caudill, W. S. et al. Foreclosure complaint filed. Gone to judgment. Sheriff's certificate of sale issued. Sheriff's deed due April 20, 1937.

Case No. 43111-A—H. S. McCluskey, versus Crump, Virginia F. et al. Foreclosure complaint filed. Gone to judgment. Sheriff's certificate of sale issued. Deficiency judgment taken in the sum of $3,170.48. Sheriff's deed due April 27, 1937.

Case No. 43318-A—H. S. McCluskey, versus Davis, Wright, et al. Foreclosure complaint filed. Gone to judgment. Sheriff's certificate of sale issued. Sheriff's deed due April 20, 1937.

Case No. 43350-B—H. S. McCluskey, versus Davis, Wright, et al. Foreclosure complaint filed. Gone to judgment. Sheriff's certificate of sale issued. Sheriff's deed due April 20, 1937.

Exhibit No. VIII.—(Continued)

Case No. 43319-B—H. S. McCluskey, versus Davis, Wright, et al. Foreclosure complaint filed. Gone to judgment. Sheriff's certificate of sale issued. Sheriff's deed due April 20, 1937. [124]

Case No. 43938-C—H. S. McCluskey, versus Greenlee, Rufus E. et al. Foreclosure complaint filed. Gone to judgment. Sheriff's certificate of sale issued. Sale set for April 20, 1937, at ten o'clock A.M.

Case No. 43317-D—H. S. McCluskey, versus Edmondson, Marcel Hollen, et al. Foreclosure complaint filed. Gone to judgment. Sheriff's certificate of sale issued. Sheriff's deed due April 27, 1937.

Case No. 43340-C—H. S. McCluskey, versus Hall, M. D. et al. Foreclosure complaint filed. Gone to judgment. Sheriff's certificate of sale issued. Sheriff's deed due April 27, 1937.

Case No. 44559-D—H. S. McCluskey, versus Holeman, Anna H. et al. Foreclosure complaint filed March 31. Summons issued and defendants served.

Case No. 43169-C—H. S. McCluskey, versus Kuhne, Lue Ethel Goble, et al. Foreclosure complaint filed. Gone to judgment. Sheriff's certificate of sale issued. Deficiency judgment taken in the sum of $149.80. Sheriff's deed due April 20, 1937.

Case No. 43339-B—H. S. McCluskey, versus LeBaron, Conway, et al. Foreclosure complaint filed. Gone to judgment. Sheriff's certificate of sale issued. Sheriff's deed due April 27, 1937.

Exhibit No. VIII.—(Continued)

Case No. 43505-B—H. S. McCluskey, versus the known heirs and unknown heirs of Mercedes G. Lee, deceased. Foreclosure complaint filed. Gone to judgment. Sheriff's certificate of sale issued. Sheriff's deed due July 5, 1937.

Case No. 43151-B—H. S. McCluskey, versus Lincoln Mortgage Company, et al. Foreclosure complaint filed. Sheriff's certificate of sale due April 20, 1937. Deficiency judgment taken in the sum of $14,334.43.

Case No. 43112-B—H. S. McCluskey, versus McGlothlin, Edgar, et al. Foreclosure complaint filed. Sheriff's certificate of sale issued. Sheriff's deed due April 27, 1937.

Case No. 43295-C—H. S. McCluskey, versus Nelson, George B. et al. Foreclosure complaint filed. Sheriff's certificate of sale issued. Sheriff's deed due April 27, 1937.

Case No. 43294-B—H. S. McCluskey, versus Nelson, George B. et al. Foreclosure complaint filed. Sheriff's certificate of sale issued. Sheriff's deed due April 27, 1937.

Case No. 43234-B—H. S. McCluskey, versus George B. Nelson, et al. Foreclosure complaint filed. Sheriff's certificate of sale issued. Sheriff's deed due April 20, 1937.

Case No. 43296-D—H. S. McCluskey, versus Nelson, George B. et al. Foreclosure complaint filed. Sheriff's certificate of sale issued. Sheriff's deed due April 27, 1937. [125]

Exhibit No. VIII.—(Continued)

Case No. 43152-C—H. S. McCluskey, versus Owens, B. S. et al. Foreclosure complaint filed. Sheriff's certificate of sale issued. Sheriff's deed due April 27, 1937.

Case No. 43297-A—H. S. McCluskey, versus Pinson, Martin Leslie, et al. Foreclosure complaint filed. Sheriff's certificate of sale issued. Sheriff's deed due April 20, 1937.

Case No. 43228-D—H. S. McCluskey, versus Renwick, George, et al. Foreclosure complaint filed. Sheriff's certificate of sale issued. Sheriff's deed due April 20, 1937.

Case No. 43163-C—H. S. McCluskey, versus Rollins, Charles E. et al. Foreclosure complaint filed. Sheriff's certificate of sale issued. Sheriff's deed due April 27, 1937.

Case No. 43406-D—H. S. McCluskey, versus Staggs, Clyde Seldon et al. Foreclosure complaint filed. Judgment entered. Execution and order of sale issued. Sale set for April 27, 1937, at ten o'clock A.M.

Case No. 434644-C—H. S. McCluskey, versus Stephenson, C. W. et al. Foreclosure complaint filed. Sheriff's certificate of sale issued. Deficiency judgment taken in the sum of $500.00. Sheriff's deed due July 5, 1937.

Case No. 43609-A—H. S. McCluskey, versus Vest, Robert H. et al. Foreclosure complaint filed. Sheriff's certificate of sale issued. Sheriff's deed due July 5, 1937.

Exhibit No. VIII.—(Continued)

Case No. 43229-A—H. S. McCluskey, versus Yoakum, W. E. et al. Foreclosure complaint filed. Sheriff's certificate of sale issued. Sheriff's deed due April 27, 1937.

Navajo County

H. S. McCluskey, versus Carter, Harry, et al. Foreclosure complaint filed. Petition for order for authority to compromise indebtedness of Harry Carter, et ux, granted. Papers released.

Case No. 4082—H. S. McCluskey, versus Farr, Dewey, et al. Foreclosure complaint filed. Default entered against all defendants, case at issue and ready to be tried.

Case No. 4225—H. S. McCluskey, versus Ferguson, W. E. et al. Foreclosure complaint filed on March 22, 1937. Service made on all defendants. Case pending.

Pinal County

Case No. 5817—H. S. McCluskey, versus Darr, J. S. et al. Foreclosure complaint filed. Sheriff's certificate of sale issued. Deficiency judgment taken in the sum of $100.00. Sheriff's deed due July 15, 1937.

Case No. 5777—H. S. McCluskey, versus Templeton, Phebe, et al. Foreclosure complaint filed. Sheriff's certificate of sale issued. Sheriff's deed due July 15, 1937.

Case No. 5804—H. S. McCluskey, versus Ward, Homer B. et al. Foreclosure complaint filed. Sheriff's certificate of sale issued. Deficiency judgment

Exhibit No. VIII.—(Continued)

taken in the sum of $100.00 and later released in consideration of a quit-claim deed from Homer B. Ward, et ux, to Association. Sheriff's deed due July 15, 1937. [126]

Santa Cruz.

Case No. 2984—H. S. McCluskey, versus Munoz, Eleazar S. et al. Foreclosure complaint filed. Sheriff's certificate of sale issued. Sheriff's deed due We have not received a copy of the sheriff's certificate of sale on this property. Have written letters asking for same but they have not been answered.

Case No. 3017—H. S. McCluskey versus Bettwy, A. et al. Foreclosure complaint filed. Defendant has made numerous promises to pay rent in lieu of having a receiver appointed. He has failed to comply with promises and hearing for application of appointment of receiver was set for hearing on February 4, 1937. Gordon Farley, attorney for defendant, asked that this hearing be postponed till after the meeting of the legislature. Matter to be reset.

Yavapai County

Case No. 13672—H. S. McCluskey versus Frye, Clara Reuter, et al. Foreclosure complaint filed. Case at issue. Ready to be tried.

Case No. 13789—H. S. McCluskey, versus Jacob, Lula A. et al. Foreclosure complaint filed. Sheriff's certificate of sale issued. Sheriff's deed due August 15, 1937.

Exhibit No. VIII.—(Continued)

Case No. 43297—H. S. McCluskey versus Paar, Viva Head, et al. Foreclosure complaint filed. Sheriff's certificate of sale issued. Sheriff's deed due. Have written for same.

Case No. 13694—H. S. McCluskey, versus Story, Thomas A. et al. Foreclosure complaint filed. Moratorium granted to March 4, 1937. Order to court that Story pay into office of the clerk certain monthly rentals. Story in default. Has paid nothing since December.

Yuma County

Case No. 9079—H. S. McCluskey versus Ham, Eva J. et al. Foreclosure complaint filed. Gone to judgment. Sheriff's certificate of sale issued. Sheriff's deed due August 15, 1937.

Case No. 9126—H. S. McCluskey, versus Spain, Lawrence C. et al. Foreclosure complaint filed. Gone to judgment. Sheriff's certificate of sale issued. Sheriff's deed due August 15, 1937.

Case No. 9132—H. S. McCluskey versus McIntire, Clarence F. et al. Foreclosure complaint filed. Gone to judgment. Sheriff's certificate of sale issued. Sheriff's deed due August 15, 1937. [127]

EXHIBIT No. IX.

NOTES AND MORTGAGES UPON WHICH PAYMENTS WERE BEING MADE ON APRIL 1, 1937

Loan No.	Name	Smith Inventory 11/30/35	Hill Inventory 4/1/37
357	Simons, R. R.	$ 62.78	$ 50.23
369	Freeman, J. A. Jr.	226.68	75.17
640	John L. Willis	536.53	81.40
698	Love, C. S.	6,893.47	6,470.11
730	Riggs, Wm. A.	339.25	19.62
799	Ficke, Aug.	1,498.56	787.23
912	Donahue, M. J.	274.79	138.01
951	Madrid, C. G.	394.07	360.57
1029	Freeman, J. A.	151.00	102.92
1062	T. C. Thomas	135.14	14.28
1258	Stringyan, S. John	181.86	76.25
1313	Myer, John L.	586.29	300.00
1407	Goetz, Hazel L.	3,356.11	1,581.45
1457	Tisdale, Wm. Gray	524.42	360.69
1489	Whitely, Geo. C.	612.90	434.31
1527	Gibbons, Mabel	1,125.18	1,068.87
1559	Womack or C. E. Johnson	298.11	171.11
1584	J. Holstein	177.29	205.03
1626	Chas. N. Gay	275.67	179.69
1686	Laurabel Gardner	2,217.30	1,959.89
1696	Shrewsbury, J. H.	561.53	495.32
1715	Shumway, S. B.	1,895.98	1,654.78
1790	Major, Mrs. Heber	325.56	289.85
1835	J. T. Neill	662.12	55.25
1866	Ida Vinson	598.52	445.71
2012	Mary Houck	1,133.12	795.69
2173	Blye, Georgia A.	722.56	552.08
2201	J. L. Oberba	486.15	221.12
2217	Thomas Short	3,185.25	3,155.67
2219	Gertrude Smith	1,880.20	1,789.84
2220	O. A. Edwards	557.39	433.57
2227	Kurtz, Ozella Park	1,378.75	1,181.38
2243	Eliz. E. Adams	691.97	535.88
76	Lynn Lockhart	57,943.09	58,027.96
2290	Ingleside Land	10,011.78	9,650.84

Notes and Mortgages upon which payments were being made on April 1, 1937—(Continued)

Loan No.	Name	Smith Inventory 11/30/35	Hill Inventory 4/1/37
2297	Johnson, J. O.	2,781.70	2,392.63
2299	Daniel Rumph	1,780.18	746.04
		$106,463.25	$96,860.44

Reconciliation with Inventory of Harry H. Hill

There are shown on the inventory of Harry W. Hill, under Real Estate Loans—Arizona, 53 items which include in addition to the above:	
14 notes and mortgages on which foreclosures were pending (Ex. VIII, p. 4), April 1, 1937 balance	29,947.78
Loan 2204, Catherina Short, which had been foreclosed and purchased at sheriff's sale for benefit of receivership estate (Ex. VIII, p. 2)	6,239.52
Per inventory of April 1, 1937	$133,047.74

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EXHIBIT No. X.

REAL ESTATE SOLD FOR CASH

REO No.	Name of Property	Book Balance	Appraised Value	Sale Price
120	Westward Ho Garage	49,885.06	45,000.00	44,000.00
126	Williams	1,793.83	350.00	550.00
128	Williams	1,379.24	900.00	900.00
198	Pickus	2,172.60	2,450.00	1,950.00
204	Wilson	5,069.34	3,400.00	3,300.00
308	Mahoney	1,987.26	600.00	600.00
352	Crugar	6,410.13	5,287.00	5,600.00
357	Cambridge	3,676.60	3,000.00	3,000.00
358	Riggins	1,683.25	1,550.00	1,450.00
359	Rohe	4,937.35	3,750.00	2,900.00
		78,994.66	66,287.00	64,250.00

REAL ESTATE SOLD ON CONTRACT

REO No.	Name of Property	Book Balance	Value Appraised	Amount of Contract
188	Durrough	577.23	500.00	350.00
356	Lukin	2,079.37	1,900.00	700.00
183	Clara W. Wolfe	2,367.62	1,640.00	1,500.00
292	Smith	2,412.90	1,180.00	1,300.00
333	Greer	1,790.26	1,275.00	1,400.00
123	Temple	936.17	700.00	800.00
140	Snow	1,192.85	370.00	800.00
362	Mytinger	4,415.09	3,900.00	3,900.00
355	Stafford	951.40	600.00	700.00
349	McDonald	5,180.44	3,250.00	3,450.00
206	Dutton	5,079.18	2,800.00	2,500.00
187	Lang	1,312.92	750.00	600.00
127	Williams	1,507.46	450.00	700.00
		29,802.89	19,315.00	18,700.00
Purchaser assumes unpaid taxes in amount of.....				1,353.05

REAL ESTATE SOLD PRIOR TO APRIL 1, 1937, BUT CONSIDERATION NOT PAID UNTIL AFTER APRIL 1, 1937

REO No.	Name of Property	Balance Apr. 1, 1937	Appraised Value	Sale Price
190	Morrell	$ 5,742.95	$ 3,450.00	$ 3,300.00
208	White	3,750.08	1,800.00	2,050.00
314	Hillman	2,084.37	1,600.00	1,500.00
335	Fram	1,493.81	1,550.00	1,292.50
		$13,071.21	$ 8,400.00	$ 8,142.50

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EXHIBIT No. XI.

REAL ESTATE OWNED SITUATED IN ARIZONA

No.	Name	Inventory 11/30/35	Ledger Bal. 4/1/37
40	Shreve Peterson	$ 5,332.28	$ 5,332.28
124	L. W. Williams	3,178.88	3,178.88
125	L. W. Williams	3,544.04	3,544.04
131	Charles Martin	14,856.74	14,856.74
132	Orin W. Crider	4,518.46	4,523.32
133	R. W. Hamilton	4,839.30	4,844.36
142	Josephine Horwath	1,394.87	1,394.87
153	Henry W. Peterson	2,343.97	2,363.15
176	Margret Harvey	2,380.59	2,380.59
180	R. H. Ratcliff	4,867.86	4,889.34
181	Verna Stanton	985.57	985.57
182	A. M. Shoemaker	791.27	791.27
184	Tony Hoffman	3,443.13	3,443.13
185	Geo. P. Hatch	2,842.48	2,842.48
186	A. H. Hartman	4,853.11	4,853.11
189	Northern Arizona Hotel	4,547.88	5,081.79
191	Marie Belboze	6,667.36	6,667.36
192	Frank Parrish	3,471.30	3,471.30
193	Louise Weston	4,739.43	4,739.43
194	Pat Bohannon	2,262.96	2,262.96
195	Arthur R. Taylor	1,858.06	1,858.06
196	C. M. Barnett	1,919.48	1,925.77
197	McElvertt Inv. Co.	2,640.24	2,640.24
199	Wm. W. Epenbach	4,238.12	4,238.12
200	Malcon Caldwell	3,591.81	3,591.81
201	T. Morris Chambers	3,801.07	3,801.07
202	T. Morris Chambers	4,230.22	4,230.22
203	T. Morris Chambers	4,560.23	4,560.23
205	B. M. Arnold	4,755.93	4,655.93*
299	J. Ross Whiteley	2,566.01	2,566.01
301	J. R. Cosby	1,677.14	1,677.14
305	G. L. Schofield	5,590.07	5,590.07
312	Gertrude Binion	1,070.77	1,051.44
313	Fidelity Real Estate Corp.	1,568.94	1,891.46
316	O. E. Rogers	1,265.78	1,265.78
317	R. F. Schultz	1,625.44	1,625.44
325	John M. Anderson	2,798.06	2,625.50*
331	Anna L. Beals	6,050.53	6,482.79
334	Iva S. Birdsong	581.21	715.61

Real Estate Owned Situated in Arizona—(Continued)

No.	Name	Inventory 11/30/35	Ledger Bal. 4/1/37
338	Ossner D. Flake	967.01	967.01
339	Ossner D. Flake	941.22	941.22
340	John Anderson	1,388.79	1,441.49
345	Earl L. Larson	1,607.71	1,557.71*
346	Ingleside Golf Club	52,090.43	52,089.89
347	Phoenix Land & Inv. Co.	51,759.17	51,847.26
348	Harold M. Roberts	4,481.39	4,096.39*
350	Chas. H. Field	10,389.43	9,571.69
351	Tomie M. Crow	506.41	506.41
353	M. M. G. Fordham	2,068.41	2,085.28
354	A. R. Taylor	3,607.11	3,607.11
361	W. M. Jett	1,800.88	1,800.88
		$269,858.55	$269,951.00
	Error Inventory 11/30/35, No. 346	.54	
		$269,858.01	

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Ledger Balance 4/1/37 Fwd. $269,951.00

Reconciliation with Inventory of Harry W. Hill

There are shown on the inventory of Harry W. Hill, under Real Estate Owned 62 items which include in addition to the above:

5 parcels for which deeds were taken, as shown on Exhibit VII, Inventory value	14,743.48
4 Parcels sold and sale confirmed but not completed prior to April 1, 1937, as shown on Exhibit X, Inventory Value	13,071.21
2 Parcels—(R.E.O. 366 $1,127.66 and 367 $1,734.39, acquired by cancellation of contracts Nos. 170 and 181	2,862.05
Balance shown in Inventory of April 1, 1937	$300,627.74

* These accounts have been credited with deposits made by prospective purchasers.

Note: Ledger Balance of April 1, 1937, includes payments made for paving assessments, improvements, adjusted interest, and amounts credited to accounts for deposits made by prospective purchasers.

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EXHIBIT No. XII.

SUMMARY OF BOOK LOSS ON REALIZATION

	Book Balance	Appraised Value	Amount Realized	Book Loss on Realization
Real Estate sold for cash (ex. X)	78,994.66	66,287.00	64,250.00	14,744.66
Real Estate sold on Contract (Ex. X)	29,802.89	19,315.00	18,700.00	11,102.89
Real Estate Loans comprised at a book loss (Ex. VII)	15,891.96	10,569.47	10,569.47	5,322.49
Real Estate Loans refinanced through H. O. L. C. at a book loss (Ex. V)	55,957.63	38,121.04	38,121.04	17,836.59
Real Estate Owned Refinanced through H. O. L. C. at a book loss (Ex. V)	4,913.07	3,828.57	3,828.57	1,084.50
	185,560.21	138,121.08	135,469.08	50,091.13
Accounts Receivable	468.89		19.93	448.96
Adjustment and Allowances on Real Estate Loans (Ex. VII)				98.95
Book Loss on Realization (Mr. Hill's Report)				50,639.04

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Harry W. Hill

EXHIBIT No. XIII.

ARIZONA OFFICE

RECEIPTS, DISBURSEMENTS, OFFSETS, TRANSFERS AND ADJUSTMENTS

Cash and Journal Vouchers—Nov. 30, 1935 to Mar. 31, 1937

Cash on Hand and in Banks Nov. 30, 1935		$131,003.32
Real Estate Loans—Principal		336,859.43
Real Estate Loans—Principal—Canada		37,500.07
Real Estate Loans—Principal—Idaho		20.00
Real Estate Contracts—Principal		9,698.68
Real Estate Owned—Capital		117,689.97
Real Estate Subject to Redemption		225.58
Promissory Notes & Second Mortgages		1,256.12
Claims and Judgments		179.44
State & County Warrants		1,699.58
Furniture & Fixtures		109.75
Accounts Receivable		472.55
Accounts Receivable (R. Bruce Abel—Close out)		8,411.34
Accounts Receivable—Wyoming		6.44
Receiver's Income—Real Estate Operations:		47,179.23
Rents	34,517.81	
Golf Course Revenue	12,333.93	
REO 4, Nebraska	327.49	
Real Estate Operating Expense (Close outs)		1,147.64
Receiver's Income—Interest Collections		13,802.86
Real Estate Loans	12,679.97	
Real Estate Contracts	788.20	
Warrants called for payment	169.37	
Promissory Notes & Second Mortgages	165.32	
Accrued Interest—H.O.L.C. Bonds to 3-31-37		1,092.23
Receiver's Income—Dividends—Closed Banks and Certs.		112.58
Exchange Items		9,898.57
General Suspense Items		4,598.75
Transfer of Deposits		255,281.39
Uncollected Accrued Interest (12-31-33)		162.48

Cash and Journal Vouchers—(Continued)

Canadian Expense (Reports)	1,523.02
J. A. Swanson & Company (To close)	2,251.56
Royal Bank of Canada (To close)	709.83
Total	$982,892.41

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DISBURSEMENTS AND ADJUSTMENTS

Real Estate Loans—Principal		$ 38,789.13
Real Estate Contracts—Principal		18,981.41
Real Estate Owned (Capital)		21,901.85
Real Estate Owned (REO 4)—(Capital)		1,339.00
Real Estate Owned (Oregon) Returned Check		9.75
Real Estate Subject to Redemption		135,874.34
Promissory Notes & Second Mortgages		6,275.74
Home Owners' Loan Corporation Bonds		59,600.00
Accrued Interest on H.O.L.C. Bonds to 3-31-37		1,092.23
Warrants Received		1,060.12
Furniture & Fixtures		201.65
Accounts Receivable (J. A. Swanson & Co., Ltd.)		15,000.00
Real Estate Operating Account:		47,654.76
Sewer and Water expense	1,467.38	
Repairs & Maintenance	4,937.87	
Taxes and Assessments	19,095.67	
Insurance & Title Expense	3,534.11	
Rental and Miscellaneous Expense	2,218.20	
Golf Course Expense	14,175.12	
REO's—Nebraska & Oklahoma	319.67	
Liability Insurance & Agents' Bonds	1,906.74	
Real Estate Operating Income (Close outs)		1,768.73
Receiver's Liquidating Expenses		65,834.39
Receiver's Salaries	9,120.02	
Legal Advisors' Salaries	15,546.00	
Professional Accounting Service	4,821.34	
Employees' Salaries	21,740.19	
Printing, Supplies & Stationery	1,446.59	
Office Rent	3,325.00	
Telephone, Telegraph & Postage	1,698.18	

Disbursements and Adjustments—(Continued)

Travel Expense—Receivers & Legal Advisors	2,541.40	
Travel Expense—Employees	1,458.51	
Office Equipment & Maintenance	105.97	
Court Costs and Fees	893.19	
Employees' Bonds	272.98	
Receivers' Bonds	407.50	
Insurance (Miscellaneous)	838.03	
Appraisal Fees	937.80	
Social Security Tax	51.52	
Federal Unemployment Comp. Ins.	21.52	
State Unemployment Comp. Ins.	193.72	
Miscellaneous (All other)	414.93	
Canadian Appraisals		222.00
Canadian Expense (Publishing Order)		98.17

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California Expense—Lamar-Cobb		$ 32.32
Idaho Expense		125.72
Losses on Realization		50,639.04
Real Estate Loans	25,086.59	
Real Estate Owned	25,103.49	
Accounts Receivable	448.96	
Loss on Realization—Sale Canadian Assets		32,411.42
Receiver's Set-Offs in Liquidation		15,757.57
(Interest refigure adjustments)		
Exchange Items		9,904.52
General Suspense Items		5,589.23
Canadian Suspense (Collateral Security)		2,948.07
General Surplus		175.54
Transfer of Deposits		255,281.39
Uncollected Accrued Interest (12-31-33)		22,383.24
Cash on hand and in Banks Mar. 31, 1937		171,941.08
Total		$982,892.41

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EXHIBIT No. XIV.

INSTRUMENTS FILED IN CAUSE No. E-268 PHOENIX IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA BY H. S. McCLUSKEY, RECEIVER OF INTERMOUNTAIN BUILDING AND LOAN ASSOCIATION, FROM DECEMBER 2, 1935 TO APRIL 1, 1937

Filing Date		Instrument	File No.
Dec. 2, 1935	(1)	Order Directing Phoenix National Bank, The Valley National Bank, State Treasurer of Arizona, and Rulon S. Starley to Turn Over Funds and Other Assets in their Possession to H. S. McCluskey, Receiver	38
" "	(2)	Application of Appointment of Attorneys	38
" "	(3)	Order Appointing Attorneys	38
" "	(4)	Petition Praying for Instruction for Trip to Utah and Other States in Reference to Affairs of Intermountain Building & Loan Association, and Authorizing Expenses Therefore	38
" "	(5)	Order Authorizing Receiver and his Counsel to Make Trip to Utah and Other States and Allowing Expenses Therefor	38
" "	(6)	Order to Show Cause Why Appointment of Receiver Should Not Be Made Permanent (Returnable January 6, 1936)	38
" "	(7)	Petition for Extension of Time for Filing Inventory	38
" "	(8)	Order Extending Time within which to File Inventory to Four Months from and After this Date	38
" "	(9)	Petition for Order Designating Banks in Which Receiver May Deposit Funds	38
" "	(10)	Order Designating Certain Banks as Receiver's Depositories	38

Exhibit No. XIV.—(Continued)

Filing Date		Instrument	File No.
Jan. 28, 1936	(11)	Petition for Appointment of Additional Attorneys and Naming John L. Gust as Such Additional Attorney	38
" "	(12)	Order Appointing John L. Gust as Additional Attorney for Receiver	38
" "	(13)	Petition for Making of Monthly Allowance to John L. Gust, Additional Attorney for Receiver	38
" "	(14)	Order for Allowance of $300.00 per month for Receiver's Attorney, John L. Gust	38

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" "	(15)	Petition for Order for Monthly Allowance to Henry S. McCluskey, Receiver	38
" "	(16)	Order for Allowance of $500.00 to H. S. McCluskey, Receiver	38
" "	(17)	Petition for Making of Monthly Allowance to Elizabeth G. Monaghan, Attorney for Receiver	38
" "	(18)	Order for Allowance of $250.00 per month to Elizabeth G. Monaghan, Attorney for Receiver	38
" "	(19)	Petition for Monthly Allowance to Thomas W. Nealon, Attorney for Receiver	38
" "	(20)	Order for Allowance of $300.00 per month for services and $150.00 per month for expenses for Receiver's Attorney, Thomas W. Nealon	38
Feb. 8, 1936	(21)	Plaintiffs Motion to Dismiss Petition of Rulon S. Starley, Bank Commissioner of Utah, for Leave to Intervene	38
" "	(22)	Plaintiffs Memoranda of Points and Authorities on Motion to Dismiss Petition for Leave to Intervene. Filed by Rulon F. Starley, as Bank Commissioner of the State of Utah	38

Exhibit No. XIV.—(Continued)

Filing Date		Instrument	File No.
Feb. 8, 1936	(23)	Order Making the Appointment of Henry S. McCluskey, as Receiver of Intermountain Building & Loan Association, an Utah corporation, Permanent	38
" "	(24)	Oath of Receiver of Intermountain Building & Loan Association, a corporation	38
" "	(25)	Petition of Henry S. McCluskey, Receiver, for Appointment of Co-Receiver	38
" "	(26)	Order Granting Petition of Henry S. McCluskey, Receiver, for the Appointment of a Co-Receiver, and Appointing George A. Mauk as Co-Receiver	38

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" "	(27)	Oath of Co-Receiver of Intermountain Building & Loan Association	38
" "	(28)	Bond of Co-Receiver of Intermountain Building & Loan Association (American Bonding Company of Baltimore—$25,000.00)	38
" "	(29)	Order Approving Bond	
" "	(30)	Order Approving Bond of H. S. McCluskey, as modified	38
" "	(31)	Petition for Order Ratifying Certain Acts of Receiver and Conferring Additional Power and Authority on Receivers	38
" "	(32)	Order Ratifying Certain Acts of Receiver and Conferring Additional Power and Authority on Receivers	38
" "	(33)	Petition of Receivers for Authority to Pay Installment of Principal and Interest due on Note to First Trust Company of Lincoln, Nebraska	30
" "	(34)	Order Authorizing Receivers to Pay Installment of Principal and Interest Due on Note to First Trust Company of Lincoln, Nebraska	30

Exhibit No. XIV.—(Continued)

Filing Date		Instrument	File No.
Feb. 8, 1936	(35)	Petition for Authority to Sell Property to Maurice L. Reid and Beulah Reid, his wife	51
" "	(36)	Order Authorizing Receivers to Sell Property to Maurice L. Reid and Beulah Reid, his wife	51
Feb. 24, 1936	(37)	Petition of Receivers for Authority to Compromise Indebtedness of George and Mary Corroneos	41
" "	(38)	Order Authorizing Receivers to Compromise Indebtedness of George and Mary Corroneos	41
" "	(39)	Petition for Leave to Repair Property (REO #345)	31
" "	(40)	Order Granting Leave to Repair Property (REO #345)	31

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Feb. 25, 1936	(41)	Petition for Authority to Institute Suit in California	25
" "	(42)	Order Authorizing Receiver to Join with Other Plaintiffs in a Suit in California	25
Feb. 28, 1936	(43)	Petition for Order Authorizing Payment of Services to James A. Smith, Certified Public Accountant	56
" "	(44)	Order Authorizing Payment of Services to James A. Smith, C.P.A.	56
" "	(45)	Petition for Order Authorizing Assignment of Mortgage to First National Building & Loan Association	40
" "	(46)	Order Authorizing Receivers to Make Settlement of Mortgage to First National Building & Loan Association	40
" "	(47)	Petition for Leave to Repair Property REO #331	31
" "	(48)	Order Authorizing Receiver to Repair Property (Reo #331)	31

Exhibit No. XIV.—(Continued)

Filing Date		Instrument	File No.
Mar. 3, 1936	(49)	Petition of Receiver for Authority to Compromise Indebtedness of Charles C. Jarrett and Willy Jeannette Jarriett, his wife	42
" "	(50)	Order Authorizing Receiver to Compromise Indebtedness of Chas. C. Jarrett and Willy Jeannette Jarrett, his wife	42
" "	(51)	Petition for Order Authorizing Payment for Services of W. H. Plunkett Audit Company, C.P.A.	56
" "	(52)	Order Authorizing Payment of Services of W. H. Plunkett Audit Company, C.P.A.	56
" "	(53)	Petition for Authority to enter into Contract of Sale of Real Property to Sylvestre Almendarez and Juana Almendarez, his wife, and to convey same (Reo #188)	50
" "	(54)	Order Authorizing Receiver to enter into Contract of Sale of Real Property to Sylvestre Almendarez and Juana Almendarez, his wife, and to Convey Same (Reo #188)	50

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Mar. 9, 1936	(55)	Petition for Authority to Liquidate Notes and Mortgages of H. O. L. C. Bonds	36
" "	(56)	Order Authorizing Receiver to Liquidate Notes and Mortgages by Acceptance of H.O.L.C. Bonds	36
" "	(57)	Petition for Authority to Lease Property to The Texas Company (Westward Ho Garage Reo #120)	32
" "	(58)	Order Authorizing Lease of Property to The Texas Company (Westward Ho Garage—Reo #120)	32

Exhibit No. XIV.—(Continued)

Filing Date		Instrument	File No.
Mar. 23, 1936	(59)	Answer of Receiver to Petition of Shell Oil Company for Order to Show Cause why They Should not be Permitted to Retain Possession of Property	32
" "	(60)	Receiver's Memorandum of Points and Authorities in Support of Answer to Petition of Shell Oil Co.	32
" "	(61)	Affidavit of H. S. McCluskey in Petition of Shell Oil Company	32
" "	(62)	Affidavit of George A. Mauk in re Petition of Shell Oil Company	
" "	(63)	Petition for Authority to Release and Satisfy Mortgage Executed by Maurice L. Reid and Beulah C. Reed	40
" "	(64)	Order Authorizing Release and Satisfaction of Mortgage Executed by Maurice L. Reid and Beulah C. Reid	40
" "	(65)	Petition of Receiver for Extension of time Within which to File Inventory	37
" "	(66)	Order Extending Time Four Months from March 26, 1936 within which Receiver May File Inventory	37
" "	(67)	Petition for Authority of Receiver to Institute Suit in Idaho	26
" "	(68)	Order Authorizing Receiver to Institute Suit in Idaho and to Employ Counsel in that Jurisdiction	26
" "	(69)	Petition for Authority to Sell Promissory Note to Mrs. John Biava, Jr. (Loan #1054)	48

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Apr. 2, 1936	(70)	Order Authorizing Receiver to Sell Promissory Note to Mrs. John Biava	48
" "	(71)	Petition for Authority to Compromise Note and Mortgage with Arthur E. Price (Loan #2188)	43
" "	(72)	Order Authorizing Receiver to Compromise Note and Mortgage with Arthur E. Price (Loan #2188)	43

Exhibit No. XIV.—(Continued)

Filing Date		Instrument	File No.
Apr. 2, 1936	(73)	Petition for Authority to Enter into Contract to Sell Lots in Tempe (Reo #356)	49
" "	(74)	Order Authorizing Receiver to Enter Into Contract to Sell Lots in Tempe	49
Apr. 6, 1936	(75)	Petition for Authority to Send Notes, Mortgages, etc., to Court with Ancillary Receiver in Utah	28
" "	(76)	Order Authorizing Receiver to Send Notes, Mortgages, etc., to Court and Ancillary Receiver in Utah	28
Apr. 7, 1936	(77)	Petition for Order to Send Notes, Mortgages, Deeds, Land Contracts, Abstracts, Certificates of Title and Fire Insurance Policies to Receiver in Wyoming	27
" "	(78)	Order Authorizing Henry S. McCluskey and George A. Mauk, Co-Receivers of Intermountain Building & Loan Association to Send Notes, Mortgages, etc., to Receiver in Wyoming	27
" "	(79)	Petition of Co-Receivers for Authority to Institute and Join in Suit	34
" "	(80)	Order Authorizing and Directing Co-Receivers to Join with Others in a Suit in Oregon and Employ Oregon Counsel	34
" "	(81)	Petition of Receivers for Authority to Sell Property in Yuma County, Ariz.	23
" "	(82)	Order Authorizing Receivers to Sell Property in Town of Somerton, Yuma County, Arizona (Reo 128)	23
Apr. 10, 1936	(83)	Petition for Authority to Compromise Note and Mortgage of Rowena Woods, a widow, by Accepting HOLC Bonds	HOLC

Exhibit No. XIV.—(Continued)

Filing Date			Instrument	File No.
Apr. 10, 1936		(84)	Order Authorizing Co-Receivers to Compromise Note and Mortgage of Rowena Woods by Accepting HOLC Bonds	HOLC
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"	"	(85)	Petition to Compromise Indebtedness of H. E. Carmack and wife by Accepting HOLC Bonds (REL 1914)	HOLC
"	"	(86)	Order Authorizing Co-Receivers to promise Indebtedness of H. E. Carmack and wife by Accepting HOLC Bonds	HOLC
"	"	(87)	Petition to Compromise Indebtedness of Wright Davis and wife by Accepting HOLC Bonds	HOLC
"	"	(88)	Order Authorizing Receivers to Compromise Indebtedness of Wright Davis and wife by Accepting HOLC Bonds	
"	"	(89)	Petition Authorizing Receiver to Compromise Indebtedness of Perry Deal and wife by Accepting HOLC Bonds. REL 2292	HOLC
"	"	(90)	Order Authorizing Receiver to Compromise Indebtedness of Perry Deal and wife by Accepting HOLC Bonds. REL 2292	HOLC
"	"	(91)	Petition for Authority to Compromise Indebtedness of Arthur Bustament, assumed by Laura Burquez, by Acceptance HOLC Bonds, REL 2071	HOLC
"	"	(92)	Order Authorizing Receiver to Compromise Indebtedness of Arthur Bustamente, assumed by Laura Burquez, by Accepting HOLC Bonds. REL 2071	HOLC
"	"	(93)	Petition for Authority to Compromise Indebtedness of Fanny Bell Ball and husband by Accepting HOLC Bonds. REL 1500	HOLC

Exhibit No. XIV.—(Continued)

Filing Date		Instrument	File No.
Apr. 10, 1936	(94)	Order Authorizing Receivers to Compromise Indebtedness of Fanny Bell Ball and husband by Accepting HOLC Bonds. REL 1500	HOLC
"	(95)	Petition for Authority to Compromise Indebtedness of R. Gordon Campbell by Accepting HOLC Bonds. REL 2312	HOLC
"	(96)	Order Authorizing Receiver to Compromise Indebtedness of R. Gordon Campbell by Accepting HOLC Bonds. REL 2312	HOLC
"	(97)	Petition for Authority to Compromise Indebtedness of Alabert A. Condron and wife by Accepting HOLC Bonds. REL 2304	HOLC
"	(98)	Order Authorizing Receiver to Compromise Indebtedness of Albert A. Condron and wife by Accepting HOLC Bonds. REL 2304	HOLC
"	(99)	Petition for Authority to Compromise Indebtedness of J. F. Mills and Mabel Mills, assumed by Foster J. Mason. REL 1918	HOLC

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"	(100)	Order Authorizing Receiver to Compromise Indebtedness of J. F. Mills and Mabel Mills, assumed by Foster J. Mason.	
"	(101)	Petition for Authority to Compromise Indebtedness of John Fischer and wife by Accepting HOLC Bonds.	
"	(102)	Order Authorizing Receiver to Compromise Indebtedness of John Fischer and wife by Accepting HOLC Bonds.	
"	(103)	Petition for Authority to Compromise Indebtedness of J. W. Stein by Accepting HOLC Bonds.	

Exhibit No. XIV.—(Continued)

Filing Date		Instrument	File No.
Apr. 10, 1936	(104)	Order Authorizing Receiver to Compromise Indebtedness of J. W. Stein by Accepting HOLC Bonds.	
"	" (105)	Petition for Authority to Compromise Indebtedness of Mary B. Palmer and husband by Accepting HOLC Bonds.	
"	" (106)	Order Authorizing Receiver to Compromise Indebtedness of Mary B. Palmer and husband by Accepting HOLC Bonds.	
"	" (107)	Petition for Authority to Compromise Indebtedness of Eula L. Ledbetter and Andrew A. Ledbetter, assumed by Bonita Brock by Accepting HOLC Bonds.	
"	" (108)	Order Authorizing Receiver to Compromise Indebtedness of Eula L. Ledbetter and Andrew A. Ledbetter, assumed by Bonita Brock, by Accepting HOLC Bonds.	
"	" (109)	Petition for Authority to Compromise Indebtedness of Earl B. West and Irma H. West, assumed by E. C. Schneider, by Accepting HOLC Bonds.	
"	" (110)	Order Authorizing Receiver to Compromise Indebtedness of Earl B. West, and Irma H. West, assumed by E. C. Schneider, by Accepting HOLC Bonds.	
"	" (111)	First and Final Report of G. A. Mauk and for Allowance of Compensation and Discharge as Co-Receiver.	
"	" (112)	Order to Show Cause Why Report of G. A. Mauk Should not be Approved and Petition for Discharge Granted. (Set for Hearing May 11, 1936).	
"	" (113)	Petition for Authority to Send Notes, Mortgages, and Abstracts to Ancillary Receiver in Utah.	

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Exhibit No. XIV.—(Continued)

Filing Date		Instrument	File No.
Apr. 15, 1936	(114)	Order Authorizing Receiver to Send Notes, Mortgages, and Abstracts to Ancillary Receiver in Utah.	
"	" (115)	Petition for Authority to Sell Promissory Note to John A. Harrell.	
"	" (116)	Order Authorizing Receiver to Sell Promissory Note to John A. Harrell.	
Apr. 17, 1936	(117)	Petition for Authority to Compromise Indebtedness of Wright Davise and wife, assumed by Raymond F. Ingram, by Accepting HOLC Bonds.	
"	" (118)	Order Authorizing Receiver to Compromise Indebtedness of Wright Davis and wife, assumed by Raymond F. Ingram, By Accepting HOLC Bonds.	
"	" (119)	Petition for Authority to Compromise Indebtedness of Ira S. Birdsong and wife by Accepting HOLC Bonds.	
"	" (120)	Order Authorizing Receiver to Compromise Indebtedness of Ira S. Birdsong and wife by Accepting HOLC Bonds.	
"	" (121)	Petition for Authority to Compromise Indebtedness of Parmalee McCutcheon and wife by Accepting HOLC Bonds.	
"	" (122)	Order Authorizing Receiver to Compromise Indebtedness of Parmalee McCutcheon by Accepting HOLC Bonds.	
"	" (123)	Petition for Authority to Compromise Indebtedness of Wright Davis and wife, assumed by A. R. Hagan, by Accepting HOLC Bonds.	
"	" (124)	Order Authorizing Receiver to Compromise Indebtedness of Wright Davis and wife, assumed by A. R. Hagan, by Accepting HOLC Bonds.	
"	" (125)	Petition for Authority to Compromise Indebtedness of Wright Davis and wife, assumed by A. D. Stanley, by Accepting HOLC Bonds.	

Exhibit No. XIV.—(Continued)

Filing Date	Instrument	File No.
Apr. 17, 1936	(126) Order Authorizing Receiver to Compromise Indebtedness of Wright Davis and wife, assumed by A. D. Stanley, by Accepting HOLC Bonds.	
		[144]
" "	(127) Petition for Authority to Compromise Indebtedness of Olive Belle Fann and husband, by Accepting HOLC Bonds.	
" "	(128) Order Authorizing Receiver to Compromise Indebtedness of Olive Belle Fann and husband, by Accepting HOLC Bonds.	
" "	(129) Petition for Authority to Compromise Indebtedness of W. A. Dobbins, and wife, by Accepting HOLC Bonds.	
" "	(130) Order Authorizing Receiver to Compromise Indebtedness of W. A. Dobbins, and wife, by Accepting HOLC Bonds.	
" "	(131) Petition for Authority to Compromise Indebtedness of Dixie Greenlee and husband, assumed by Roy Lucas and wife by Accepting HOLC Bonds.	
" "	(132) Order Authorizing Receiver to Compromise Indebtedness of Dixie Greenlee and husband, assumed by Roy Lucas and wife, by Accepting HOLC Bonds.	
" "	(133) Order Authorizing Receiver to Compromise Indebtedness of Iva May Flower and husband by Accepting HOLC Bonds.	
" '	(134) Petition for Authority to Compromise Indebtedness of Iva May Flower and husband by Accepting HOLC Bonds.	
" "	(135) Petition for Authority to Compromise Indebtedness of Aubrey A. Moody and Mary G. Moody, assumed by Ollyn R. Tuttle and wife, by Accepting HOLC Bonds.	

Exhibit No. XIV.—(Continued)

Filing Date	Instrument	File No.
Apr. 17, 1936	(136) Order Authorizing Receiver to Compromise Indebtedness of Aubrey A. Moody and Mary G. Moody, assumed by Ollyn R. Tuttle and wife, by Accepting HOLC Bonds.	
" "	(139) Petition for Authority to Compromise Indebtedness of Violet Merrifield and husband, by Accepting HOLC Bonds.	
" "	(138) Order Authorizing Receiver to Compromise Indebtedness of Violet Merrifield and husband, by Accepting HOLC Bonds.	
" "	(139) Petition for Authority ot Compromise Indebtedness of Wm. Gray Tisdale by Accepting HOLC Bonds.	
" "	(140) Order Authorizing Receiver to Compromise Indebtedness of Wm. Gray Tisdale by Accepting HOLC Bonds.	

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" "	(141) Petition for Authority to Compromise Indebtedness of Emma Adams and husband by Accepting HOLC Bonds.	
" "	(142) Order Authorizing Receiver to Compromise Indebtedness of Emma Adams and husband by Accepting HOLC Bonds.	
" "	(143) Petition for Authority to Compromise Indebtedness of Laren W. Cress and wife by Accepting HOLC Bonds.	
" "	(144) Order Authorizing Receiver to Compromise Indebtedness of Laren W. Cress and wife by Accepting HOLC Bonds.	
" "	(145) Petition for Authority to Compromise Indebtedness of R. E. Kelsey and wife by Accepting HOLC Bonds.	
" "	(146) Order Authorizing Receiver to Compromise Indebtedness of R. E. Kelsey and wife by Accepting HOLC Bonds.	

Exhibit No. XIV.—(Continued)

Filing Date	Instrument	File No.
Apr. 17, 1936	(147) Petition for Authority to Compromise Indebtedness of Thomas O. Moore and wife by Accepting HOLC Bonds.	
" "	(148) Order Authorizing Receiver to Compromise Indebtedness of Thomas O. Moor and wife by Accepting HOLC Bonds.	
" "	(149) Petition for Authority to Compromise Indebtedness of Ida C. Messer by Accepting HOLC Bonds.	
" "	(150) Order Authorizing Receiver to Compromise Indebtedness of Ida C. Messer by Accepting HOLC Bonds.	
" "	(151) Petition for Authority to Compromise Indebtedness of Eula Jacob and husband by Accepting HOLC Bonds.	
" "	(152) Order Authorizing Receiver to Compromise Indebtedness of Eula Jacob and husband by Accepting HOLC Bonds.	
Apr. 21, 1936	(153) Petition for Authority to Compromise Indebtedness of C. M. Burnett and wife by Accepting HOLC Bonds.	
" "	(154) Order Authorizing Receiver to Compromise Indebtedness of C. M. Burnett and wife by Accepting HOLC Bonds.	

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Apr. 24, 1936	(155) Petition for Authority to Release Mortgage of Property of Intermountain Building and Loan Association in British Columbia.	
" "	(156) Order Authorizing Receiver to Release Mortgage of Property of Intermountain Building and Loan Association in British Columbia.	
" "	(157) Petition for Authority to Compromise Indebtedness of Schewel by Accepting HOLC Bonds.	

Exhibit No. XIV.—(Continued)

Filing Date		Instrument	File No.
Apr. 24, 1936	(158)	Order Authorizing Receiver to Compromise Indebtedness of Schewel by Accepting HOLC Bonds.	
"	" (159)	Petition for Authority to Compromise Note and Mortgage of Ollason by Accepting HOLC Bonds.	
"	" (160)	Order Authorizing Receiver to Compromise Note and Mortgage of Ollason by Accepting HOLC Bonds.	
"	" (161)	Petition for Authority to Compromise Note and Mortgage of McCutcheon by Accepting HOLC Bonds.	
"	" (162)	Order Authorizing Receiver to Compromise Note and Mortgage of McCutcheon by Accepting HOLC Bonds.	
"	" (163)	Petition for Authority to Compromise Note and Mortgage of McIntire by Accepting HOLC Bonds.	
"	" (164)	Order Authorizing Receiver to Compromise Note and Mortgage of McIntire by Accepting HOLC Bonds.	
May 6, 1936	(165)	Petition for Authority to Compromise Balance of Unsatisfied Deficiency Judgment against Geo. B. Nelson, et ux.	
"	" (166)	Order Authorizing Receiver to Compromise Balance of Unsatisfied Deficiency Judgment against Geo. B. Nelson, et ux.	
May 7, 1936	(167)	Petition for Authority to Send Notes and Mortgages, etc., to Ancillary Receiver in Utah.	
"	" (168)	Order Authorizing Receiver to Send Notes and Mortgages, etc., to Ancillary Receiver in Utah.	
May 8, 1936	(169)	Petition for Authority to Sell Real Estate of R. S. Anend, et al.	

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Exhibit No. XIV.—(Continued)

Filing Date		Instrument	File No.
May 8, 1936	(170)	Order Authorizing Receiver to Sell Real Estate of R. S. Anend et al.	
May 9, 1936	(171)	Affidavit of H. S. McCluskey of Publication of Order to Show Cause.	
May 11, 1936	(172)	Affidavit of Service of Order to Show Cause.	
" "	(173)	Order Approving First and Final Account of G. A. Mauk Fixing and Allowing Compensation for Services Rendered, Discharging G. A. Mauk as Co-Receiver and Exonerating his Bond.	
May 15, 1936	(174)	Petition for Authority to Execute and Deliver Deed to M. J. Putnam.	
" "	(175)	Order Authorizing Receiver to Execute and Deliver Order to M. J. Putnam.	
" "	(176)	Petition for Authority to Release and Satisfy Mortgages Which were Paid Prior to the Taking Possession of the Assets of the Intermountain Building and Loan Association by H. S. McCluskey.	
" "	(177)	Order Authorizing Receiver to Release and Satisfy Mortgages which were Paid Prior to the Taking Possession of the Assest of the Intermountain Building & Loan Association by H. S. McCluskey.	
May 18, 1936	(178)	Petition for Authority to Amend Order of April 15, 1936, Authorizing Receiver to Compromise Note and Mortgage of Ida C. Messer.	
" "	(179)	Order Authorizing Receiver to Amend Order of April 15, 1936, Authorizing Receiver to Compromise Note and Mortgage of Ida C. Messer.	
May 22, 1936	(180)	Petition for Authority to Release and Satisfy Mortgages heretofore compromised and released by J. A. Malia.	

Exhibit No. XIV.—(Continued)

Filing Date		Instrument	File No.
May 22, 1936	(181)	Order Authorizing Receiver to Release and Satisfy Mortgages heretofore compromised and released by J. A. Malia.	
"	" (182)	Petition for Order Fixing Time for Filing Claims.	
"	" (183)	Order that Claims be Filed with Receiver before Six Months from this Date and Directing Receiver to Give Notice.	

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May 23, 1936	(184)	Motion to Dismiss Petition of Southwestern Fire Insurance Company for Order Requiring Receiver to Execute Deed.	
"	" (185)	Memorandum of Points of Authorities in Support of Receiver's Motion to Dismiss.	
May 26, 1936	(186)	Petition for Authority to Send Abstract to Ancillary Receiver in Wyoming.	
"	" (187)	Order Authorizing Receiver to Send Abstract to Ancillary in Wyoming.	
May 27, 1936	(188)	Plaintiff's Motion to Set for Trial.	
May 29, 1936	(189)	Petition for Authority to Send Documents to Ancillary Receiver in Utah.	
May 29, 1936	(190)	Order Authorizing Receiver to Send Documents to Ancillary Receiver in Utah.	
"	" (191)	Petition for Order to pay for services of James A. Smith, C.P.A.	
"	" (192)	Order Authorizing Receiver to Pay for Services of James A. Smith, C.P.A.	
"	" (193)	Petition for Authority to Send Abstract to Ancillary Receiver in Wyoming.	
"	" (194)	Order Authorizing Receiver to Send Abstract to Ancillary Receiver in Wyoming.	

Exhibit No. XIV.—(Continued)

Filing Date		Instrument	File No.
May 29, 1936	(195)	Petition for Authority to Transmit Documents to Ancillary Receiver in Idaho.	
" "	(196)	Order Authorizing Receiver to Transmit Documents to Ancillary Receiver in Idaho.	
June 3, 1936	(197)	Petition for Authority to Purchase Furniture for Apartment Building in Flagstaff.	
" "	(198)	Order Authorizing Receiver to Purchase Furniture for Apartment Building in Flagstaff.	
June 4, 1936	(199)	Receiver's Memo of Points and Authorities in Support of Motion to Dismiss Petition of Southwestern Fire Insurance Company.	
June 11, 1936	(200)	Petition for Authority to Compromise Indebtedness of Clyde Seldon Staggs, et al.	
" "	(201)	Order Authorizing Receiver to Compromise Indebtedness of Clyde Seldon Staggs, et al.	

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June 11, 1936	(202)	Petition for Authority to Compromise Indebtedness of C. C. Jarrett and wife.	
" "	(203)	Order Authorizing Receiver to Compromise Indebtedness of C. C. Jarrett and wife.	
" "	(204)	Petition of H. S. McCluskey for Authority to Transmit Abstract to Attorneys for Receiver in Oregon.	
" "	(205)	Order Authorizing H. S. McCluskey, Receiver to Transmit Abstract to Wilson & Reilly, Attorneys in Oregon.	
" "	(206)	Petition for Authority to Transmit Abstracts, etc., to Ancillary Receiver in Utah.	
" "	(207)	Order Authorizing Receiver to Transmit Abstracts, etc. to Ancillary Receiver in Utah.	

Exhibit No. XIV.—(Continued)

Filing Date		Instrument	File No.
June 15, 1936	(208)	Petition for Authority to Transmit Documents to Ancillary Receiver in Idaho.	
" "	(209)	Order Authorizing Receiver to Transmit Documents to Ancillary Receiver in Idaho.	
June 19, 1936	(201)	Petition for Authority to Sever and Sell Building situated on Real Property in Idaho.	
" "	(211)	Order Authorizing Receiver to Sever and Sell Building Situated on Real Property in Idaho.	
" "	(213)	Petition for Authority to Transmit Documents to Ancillary Receiver in Idaho.	
" "	(213)	Order Authorizing Receiver to Transmit Documents to Ancillary Receiver in Idaho.	
" "	(214)	Petition for Authority to Transmit Documents to Receivers Attorneys in Oregon.	
" "	(215)	Order Authorizing Receiver to Transmit Documents to Receivers Attorneys in Oregon.	
July 1, 1936	(216)	Petition for Authority to Pay for Services of James A. Smith, C.P.A.	
" "	(217)	Order Authorizing Receiver to Pay for Services of James A. Smith, C.P.A.	
" "	(218)	Petition for Authority to Execute Lease.	
" "	(219)	Order Authorizing Receiver to Execute Lease.	
" "	(220)	Petition for Authority to Compromise Note and Mortgage of Laura Milam.	

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" "	(221)	Order Authorizing Receiver to Compromise Note and Mortgage of Laura Milam.	
" "	(222)	Petition for Authority to Accept School Warrants.	

Exhibit No. XIV.—(Continued)

Filing Date	Instrument	File No.
July 1, 1936	(223) Order Authorizing Receiver to Accept School Warrants.	
" "	(224) Petition for Authority to Sell Real Estate.	
" "	(225) Order Authorizing Receiver to Sell Real Estate.	
" "	(226) Petition for Order to Compromise Indebtedness.	
" "	(227) Order Authorizing Receiver to Compromise Indebtedness.	
" "	(228) Petition to Transmit Insurance Policies to Receiver's Attorneys in Oregon.	
" "	(229) Order Authorizing Receiver to Transmit Insurance Policies to Messrs. Wilson & Riley, Receiver's Attorneys in Oregon.	
" "	(230) Petition to Transmit Records to British Columbia and Release Mortgage.	
" "	(231) Order Authorizing Receiver to Transmit Records to British Columbia and Release Mortgage.	
July 3, 1936	(232) Petition to Compromise Mortgage of Anton R. and Olga Carlson.	
" "	(233) Order Authorizing Receiver to Compromise Mortgage of Anton R. and Olga Carlson.	
July 13, 1936	(234) Petition for Authority to Segregate Funds for Protection of Phoenix Title & Trust Company on Title Policies pending Final Determination on Validity of Liens.	
" "	(235) Order Authorizing Receiver to Segregate Funds for Protection of Phoenix Title & Trust Company on Title Policies Pending Final Determination on Validity of Liens.	
" "	(236) Receiver's Answer to Petition of Southwest Fire Insurance Company for Order Requiring Receiver to Execute Deed.	

Exhibit No. XIV.—(Continued)

Filing Date		Instrument	File No.
July 13, 1936	(237)	Petition for Authority to Make Trip to California.	
"	" (238)	Order Authorizing Receiver to Make Trip to California.	

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July 17, 1936	(239)	Petition for Appointment of Appraisers to Appraise Property in Coconino County on which Receiver has Offer and/or Prospective Purchasers (REL 2287 and 2288—Hutson Property)	33D
"	" (240)	Order Appointing Appraisers to Appraise Property in Coconino County (REL 2287 and 2288)	33D
"	" (241)	Petition for Appointment of Appraisers to Appraise Property in Pima County on which Receiver has Offer and/or Prospective Purchasers (Reo 362, 204, 349)	33E
"	" (242)	Order Appointing Appraisers to Appraise Property in Pima County (Reo 362, 204, 349)	33E
"	" (243)	Petition for Appointment of Appraisers to Appraise Property in Navajo County on which Receiver has Offers and/or Prospective Purchasers (Rel 2170, 2175, Reo 189, Reo 313, Rel 1527, and Rel 2061	33C
"	" (244)	Order Appointing Appraisers to Appraise Property in Navajo County (REL 2170, REL 2175, REO 189, REO 313, REL 1527, and REL 2061)	33C
"	" (245)	Petition for Appointment of Appraisers to Appraise Property in Navajo County on which Receiver has Offer and/or Prospective Purchaser (REO 359)	33C
"	" (246)	Order Appointing Appraisers to Appraise Property in Navajo County (REO 359)	33C

Exhibit No. XIV.—(Continued)

Filing Date		Instrument	File No.
July 17, 1936	(247)	Petition for Authority to Transmit Documents to Receiver's Attorneys in Oregon	34
" "	(248)	Order Authorizing Receiver to Transmit Documents to Receiver's Attorneys in Oregon	34
" "	(249)	Petition for Sale of Choses in Action Promissory Notes secured mortgages and other assets situated in British Columbia, Canada	29
" "	(250)	Order to Show Cause Why Petition for Order Authorizing and Directing Receiver to Sell Assets in British Columbia Should Not Be Granted (Returnable July 31, 1936)	29

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" "	(251)	Petition for Appointment of Appraisers to Appraise Property in Maricopa County on which Receiver has Offer and/or Prospective Purchasers (Reo #123, 292, 333, 357, Rel #2131)	33C
" "	(252)	Order Appointing Appraisers to Appraise Property in Maricopa County (REO #123, 292, 333, 357, REL #2131)	33C
July 21, 1936	(253)	Petition for Appointment of Appraisers to Appraise Property in Yuma County on which Receiver has offer and/or Prospective Purchasers (Reo 127, 208)	33B
" "	(254)	Order Appointing Appraisers to Appraise Property in Yuma County on which Receiver has Offer and/or Prospective Purchasers (REO 127 and 208)	33B
July 22, 1936	(255)	Petition for Authority to Transmit Documents to Ancillary Receiver in Wyoming	27

Exhibit No. XIV.—(Continued)

Filing Date		Instrument	File No.
July 22, 1936	(256)	Order Authorizing Receiver to Transmit Documents to Ancillary Receiver in Wyoming	
July 23, 1936	(257)	Receiver's Inventory and Partial Report.	
" "	(258)	Receiver's Exhibits Accompanying Inventory and Report in 3 parts.	
July 24, 1936	(259)	Receiver's Petition for Authority to Compromise Indebtedness of Giragi Brothers (Loan 2130)	11
" "	(260)	Order Authorizing Receiver to Compromise Indebtedness of Giragi Brothers	11
Aug. 3, 1936	(261)	Petition for Authority to Transmit Documents to Oregon	34
" "	(262)	Order Authorizing Receiver to Transmit Documents to Oregon	34
" "	(263)	Affidavit of Service of Order to Show Cause by Publication	29
" "	(264)	Petition for Order Authorizing Sale and Confirmation Thereof of Promissory Notes Secured by Mortgages on Real Property situated in British Columbia	29
" "	(265)	Order Authorizing Sale and Confirmation Thereof of Promissory Notes Secured by Mortgages on Real Property Situated in British Columbia, Canada and Other Assets	29

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" "	(266)	Petition of Henry S. McCluskey, Receiver, for Order Authorizing Him to Transmit Abstracts, Deeds, etc. Pertaining to Idaho Loan to Charles A. McLean, His Co-Ancillary Receiver in Idaho	26

Exhibit No. XIV.—(Continued)

Filing Date		Instrument	File No.
Aug. 3, 1936	(267)	Order Authorizing Henry S. McCluskey, Receiver, to Transmit to his Cocillary Receiver in Idaho, Charles A. McLean, Esquire, Abstract, Deed, Insurance Policy, etc.	26
Aug. 14, 1936	(268)	Petition for Authority to Repair Roof on Property in Globe, Arizona	31
" "	(269)	Order Authorizing Receiver to Repair Roof on Property in Globe, Arizona	31
" "	(270)	Petition for Authority to Transmit Documents to Oregon	34
" "	(271)	Order Authorizing Receiver to Transmit Documents to Oregon	34
" "	(272)	Petition for Authority to Transmit Documents to Wyoming	27
" "	(273)	Order Authorizing Receiver to Transmit Documents to Wyoming	27
" "	(274)	Petition of Henry S McCluskey, Receiver, for Authority to Compromise Loan of E. S. Westover, of Joseph City, Ariz.	10
" "	(275)	Order Authorizing Henry S. McCluskey, Receiver, to Compromise Loan of E. S. Westover of Joseph City, Ariz.	10
" "	(276)	Petition for Order Authorizing Receiver to Sell Real Property at Private Sale, Subject to Confirmation by the Court, and for Order to Show Cause Thereon (Wilson Property—REO #204—Sold to Henry R. Merchant and wife)	2
" "	(277)	Order to Show Cause Why Petition of Henry S. McCluskey, Receiver of Intermountain Building & Loan Association, an Utah Corporation, for an Order Authorizing and Directing Him to Sell Real Estate of Said Corporation at Private Sale Should Not Be Granted (Returnable Aug. 28, 1936) (Reo #204)	2

Exhibit No. XIV.—(Continued)

Filing Date		Instrument	File No.
Aug. 14, 1936	(278)	Petition for Authority to File Suit Auxiliary and Ancillary to E-268 Phx.	
" "	(279)	Order Authorizing Receiver to File Suit in this Court for Cancellation of Attachment.	

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Aug. 28, 1936	(280)	Affidavit of Service of Order to Show Cause by Publication (REO 204)	2
" "	(281)	Petition for Order Authorizing Sale and Confirmation Thereof of Real Property in Pima County, Arizona (REO #204—Wilson Property to Merchant)	2
" "	(282)	Order Authorizing Sale and Confirmation Thereof of Certain Real Estate Located in Pima County, Arizona (Reo #204)	2
" "	(283)	Petition for Appointment of Appraisers to Appraise Property in Yuma County on which Receiver has Offer and/or Prospective Purchasers (Reo 125, 126, and 140)	33B
" "	(284)	Order Appointing Appraisers to Appraise Property in Yuma County on which Receiver has Offer and/or Prospective Purchaser (Reo 125, 126, and 140)	33B
" "	(285)	Petition for Appointment of Appraisers To Appraise Property in Maricopa County on which Receiver has Offers and/or Prospective Purchasers (REC 117, REL 2109, REO 309, REO 331)	33A
" "	(286)	Order Appointing Appraisers to Appraise Property in Maricopa County on which Receiver Has Offers and/or Prospective Purchasers (REO 117, REL 2109, REO 308, REO 331)	33A

Exhibit No. XIV.—(Continued)

Filing Date		Instrument	File No.
Aug. 28, 1936	(287)	Petition for Appointment of Appraisers to Appraise Property in Mesa, Maricopa County, Arizona (REO 40)	33A
" "	(288)	Order Appointing Appraisers to Appraise Property in Mesa, Maricopa County, Arizona (REO 40)	33A
" "	(289)	Petition for Order Authorizing Receiver to Sell Real Property at Private Sale, Subject to Confirmation by the Court, and for Order to Show Cause Thereon (REO 362—Mytinger Property to J. Grant Howard)	1
" "	(290)	Order to Show Cause Why Petition of Henry S. McCluskey, Receiver of Intermountain Building & Loan Association, an Utah corporation, for an Order Authorizing and Directing Him to Sell Real Estate of said Corporation at Private Sale, Should Not Be Granted	1

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Sept. 2, 1936	(291)	Petition for Order Authorizing Receiver to Sell Real Property at Private Sale, Subject to Confirmation by the Court, and for Order to Show Cause Thereon (Reo #349—McDonald Property Sold to J. R. Morrison)	3
" "	(292)	Order to Show Cause Why the Petition of Henry S. McCluskey, Receiver of Intermountain Building & Loan Association, an Utah corporation, for an Order Authorizing and Directing Him to Sell Real Estate of said Corporation at Private Sale Should Not be Granted (Reo #349—McDonald Property Sold to J. R. Morrison)	3
" "	(293)	Petition for Instructions on Offer of Eugene Leonard and Clara T. Leonard, husband and wife, to Compromise Indebtedness REL 2175	7

Exhibit No. XIV.—(Continued)

Filing Date		Instrument	File No.
Sept. 2, 1936	(294)	Order Authorizing Henry S. McCluskey Receiver, to Compromise Indebtedness of Eugene Leonard and Clara T. Leonard, husband and wife (REL 2175)	7
"	" (295)	Petition for Instructions on Offer of O. C. Williams to Compromise Indebtedness (REL 2170)	9
"	" (296)	Order Authorizing Receiver to Compromise Indebtedness of O. C. Williams (REL 2170)	9
Sept. 9, 1936	(297)	Affidavit of Service of Order to Show Cause by Publication	1
Sept. 14, 1936	(298)	Order Directing Receiver to Disclaim lien on Property by Reason of Judgment.	
"	" (299)	Petition for Order Authorizing Sale and Confirmation Thereof of Real Property in Pima County, Arizona	1
"	" (300)	Order Authorizing Sale and Confirmation Thereof of Certain Real Estate Located in Pima County, Arizona (Mytinger Property—REO 362)	1
"	" (301)	Petition for Order Authorizing Receiver to Make Certain Repairs to Property Situated in Pinal County, Arizona	31
"	" (302)	Order Authorizing Receiver to Make Certain Repairs to Property situated in Pinal County, Arizona	31

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"	" (303)	Petition for Order Authorizing Receiver to Improve Property	31
"	" (304)	Order Authorizing Henry S. McCluskey Receiver, to Improve Property	31
"	" (305)	Petition of Henry S. McCluskey, Receiver, Asking for the Appointment of Appraisers to Appraise Property in Maricopa County, Arizona, on which He Has Offers and Prospective Purchasers	33A

Exhibit No. XIV.—(Continued)

Filing Date			Instrument	File No.
Sept. 14, 1936		(306)	Order Appointing Appraisers for Property in Maricopa County, Arizona, on which Henry S. McCluskey, Receiver, Has Offers and/or Prospective Purchasers (REO #183, #292, and #333)	33A
"	"	(307)	Petition for Instructions on Offer of Nannie Wilson to Compromise Indebtedness	8
"	"	(308)	Order Authorizing Henry S. McCluskey Receiver, to Compromise the Indebtedness of Nannie Wilson	8
"	"	(309)	Petition for the Appointment of Appraisers to Appraise Property in Maricopa County, Arizona, on Which He Has Offers and Prospective Purchasers (REO 335)	33A
"	"	(310)	Order Appointing Appraisers for Property in Maricopa County, Arizona, on Which Henry S. McCluskey, Receiver, Has Offers and/or Prospective Purchasers (REO #335)	33A
"	"	(311)	Petition of Henry S. McCluskey, Receiver, for Authority to Accept Quit-Claim Deed from C. G. Madrid and Beatrice Madrid, his wife, in Lieu of Foreclosure (Loan 951)	6
"	"	(312)	Order Authorizing Henry S. McCluskey Receiver, to Accept Quit-Claim Deed from C. G. Madrid and Beatrice Madrid, his wife, in Lieu of Foreclosure (Loan 951)	6
"	"	(313)	Petition for Instructions on Offer of William Gray Tisdale to Compromise Indebtedness (Loan 1457)	5
"	"	(314)	Order Authorizing Receiver to Compromise Indebtedness of William Gray Tisdale	5

Exhibit No. XIV.—(Continued)

Filing Date		Instrument	File No.
Sept. 21, 1936	(315)	Affidavit of Service by Publication (REO 349—McDonald Property sold to J. R. Morrison)	3
" "	(316)	Petition for Order Authorizing Sale and Confirmation Thereof of Real Property in Pima County, Arizona. (REO 349)—McDonald Property	3
" "	(317)	Order Authorizing Sale and Confirmation Thereof of Certain Real Estate Located in Pima County, Arizona	3
Sept. 24, 1936	(318)	Petition of Henry S. McCluskey, Receiver Asking for Appointment of Appraisers to Appraise Property in Maricopa County, Arizona (Lots 10, 11, 12 Sweeney Tract)	33A
" "	(319)	Order Authorizing Henry S. McCluskey, Receiver, to Appoint Appraiser for Property in Maricopa County, Arizona	33A
Sept. 28, 1936	(320)	Petition to Revoke Leave of Court Granted to Thomas R. Short et ux to Join Receiver as Defendant in Yavapai County.	
" "	(321)	Memoranda of Points and Authorities to Revoke Leave of Court Granted to Thomas R. Short et ux to Join Receiver as Defendant in YavapaiCounty.	
" "	(322)	Petition for Order Authorizing Receiver to Lease Property from Owner for Use as Clubhouse in Connection with Golf Course Operated by the Receiver, and to Employ Golf Professional (REO #346)	59
" "	(323)	Order Authorizing Henry S. McCluskey, Receiver, to Lease from the Owner Clubhouse in Connection with Operation of Golf Course and to Enter Into a Contract of Employment for the Operation of said Golf Course	59

Exhibit No. XIV.—(Continued)

Filing Date		Instrument	File No.
Sept. 28, 1936	(324)	Petition for Order Authorizing Receiver to Improve Property in Lincoln, Nebraska	30
" "	(325)	Order Authorizing Receiver to Improve Property in Lincoln, Nebraska	30
" "	(326)	Petition for Authority to Improve Premises (Casa Grande premises)	31
" "	(327)	Order Authorizing Receiver to Improve Premises (Casa Grande Property)	31

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Sept. 28, 1936	(328)	Petition of H. S. McCluskey, Receiver to Compromise Loan of E. S. Westover of Joseph City, Arizona, and to Vacate Order Heretofore Made Thereon	10
" "	(329)	Order Authorizing H. S. McCluskey to Compromise Loan of E. S. Westover and Vacating Order Previously Made Thereon	10
" "	(330)	Petition for Authority to Sell Real Property at Private Sale and for Confirmation thereon and Order to Show Cause (Almendarez Property—REO 183)	4
" "	(331)	Order to Show Cause Why Petition of of Henry S. McCluskey, Receiver of Intermountain Building & Loan Association, an Utah Corporation, for an Order Authorizing and Directing him to Sell Real Estate of said corporation at Private Sale, Should Not be Granted (REO 183)	4
" "	(332)	Petition for Order Authorizing Receiver to Sell Real Property at Private Sale, Subject to Confirmation by Court, and for Order to Show Cause Thereon (REO 333)	14

Exhibit No. XIV—(Continued.)

Filing Date		Instrument	File No.
Sept. 28, 1936	(333)	Order to Show Cause Why Petition of Henry S. McCluskey, Receiver of Intermountain Building & Loan Association, an Utah Corporation, for an Order Authorizing and Directing Him to Sell Real Estate of said Corporation at Private Sale, Should Not be Granted (REO 333—Greer Property)	14
"	(334)	Petition for Order Authorizing Receiver to Sell Real Property at Private Sale, Subject to Confirmation by the Court, and for Order to Show Cause Thereon (REO 140 — Snow Property)	16
"	(335)	Order to Show Cause Why Petition of Henry S. McCluskey, Receiver of Intermountain Building & Loan Association, an Utah corporation, for an Order Authorizing and Directing him to Sell Real Estate of said corporation at Private Sale, should not be Granted (REO 140—Snow Property)	16
"	(336)	Petition for Order Authorizing Receiver to Sell Real Property at Private Sale, Subject to Confirmation by the Court, and for Order to Show Cause thereon (REO 292 — Smith Property)	20

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"	(337)	Order to Show Cause Why Petition of Henry S. McCluskey, Receiver of Intermountain Building & Loan Association, an Utah corporation, for an Order Authorizing and Directing him to Sell Real Estate of said Corporation at Private Sale, Should Not be Granted (REO 292—Smith Property)	20

Exhibit No. XIV—(Continued.)

Filing Date		Instrument	File No.
Sept. 28, 1936	(338)	Petition for Order Authorizing Receiver to Sell Real Property at Private Sale, Subject to Confirmation by the Court, and for Order to Show Cause Thereon (REO 359—Rohe Property)	21
" "	(339)	Order to Show Cause Why Petition of Henry S. McCluskey, Receiver, for Order Authorizing and Directing Him to Sell Real Estate of said corporation at Private Sale, Should Not be Granted (REO 359—Rohe Property)	21
Sept. 29, 1936	(340)	Hearing on Original Proceedings—Nine Exhibits Filed, Four Witnesses Sworn, Plaintiff moves for Decree. Attorney Moore moves for $50.00 Attortorey's Fees.	
Oct. 3, 1936	(341)	Findings of Fact and Conclusions of Law (Approximately 500 pages) and Decree, and Confirming Appointment of Permanent Receiver.	
Oct. 5, 1936	(342)	Petition of Henry S. McCluskey, Receiver Asking for Appointment of Appraisers to Appraise Property in Maricopa County, Arizona	33A
" "	(343)	Order Appointing Appraisers to Appraise Property in Maricopa County, Arizona	33A
" "	(344)	Petition for Authority to Accept Quit-Claim Deed from Delbert Jones (REL 1448)	17
" "	(345)	Order Authorizing Receiver to Accept Quit-Claim Deed from Delbert Jones	17
" "	(346)	Petition for Order Authorizing Receiver to Sell Real Property at Private Sale, Subject to Confirmation by the Court, and for Order to Show Cause Thereon	19

Exhibit No. XIV—(Continued.)

Filing Date		Instrument	File No.
Oct. 5, 1936	(347)	Order to Show Cause Why Petition of of Receiver for Order Authorizing and Directing Him to Sell Real Estate at Private Sale Should Not Be Granted REO 123—Temple Property	19

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"	"	(348) Affidavit of Service of Petition to Revoke Leave Heretofore Granted to Joint Receiver as Defendant	134A
"	"	(349) Affidavit of Service of Petition to Revoke Lease Heretofore Granted to Join Receiver as Defendant (See McCluskey vs. Barrett suit)	134A
Oct. 12, 1936		(350) Affidavit of Service of Order to Show Cause by Publication (REO 183) (Almendarez Property to Stauffer)	4
"	"	(351) Petition for Order Authorizing Sale and Confirmation Thereof, of Real Property in Maricopa County, Arizona (REO 183—Almendarez Property to Stauffer)	4
"	"	(352) Order Authorizing Sale and Confirmation Thereof of Certain Real Estate in Maricopa County, State of Arizona (REO 190 — Almendarez Property to Stauffer)	4
"	"	(353) Affidavit of Service of Order to Show Cause by Publication (REO 333—Greer to Talbott	14
"	"	(354) Petition for Order Authorizing Sale and Confirmation thereof, of Real Property in Maricopa County, Arizona, (REO 333—Greer Property to Talbott)	14
"	"	(355) Order Authorizing Sale and Confirmation Thereof of Certain Real Estate in Maricopa County, State of Arizona (Reo 333—Greer Property to Talbott)	14

Exhibit No. XIV—(Continued.)

Filing Date			Instrument	File No.
Oct. 12, 1936		(356)	Affidavit of Service of Order to Show Cause by Publication (REO 292) Smith Property to Findley	20
"	"	(357)	Petition for Order Authorizing Sale and Confirmation thereof, of Real Property in Maricopa County, Arizona (REO 292—Smith Property to Findley)	20
"	"	(358)	Order Authorizing Sale and Confirmation Thereof, of Certain Real Estate in Maricopa County, State of Arizona (Reo 292—Smith Property to Findley)	20
"	"	(359)	Petition for Order Authorizing Receiver to Sell Real Property at Private Sale Subject to Confirmation by the Court, and for Order to Show Cause Thereon	18
"	"	(360)	Order to Show Cause Why Petition of Receiver for Order Authorizing and Directing Him to Sell Real Estate of Said Corporation at Private Sale Should Not Be Granted (REO 198—Fickas to Amend)	18

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"	"	(361)	Petition for Order Authorizing Receiver to Improve Property	31
"	"	(362)	Order Authorizing Henry S. McCluskey Receiver to Improve Property (Lot 1 Block 7, Vel Ru, Maricopa County, Arizona)	31
Oct. 15, 1936		(363)	Petition for Order Authorizing Receiver to Connect Properties with City Water System and to Sell Existing Water System Supplying Properties and to Sell Pumps and Equipment (Reo 192, 195, 200 and REL 1698, 1772, 1700, 1771, Reo 345)	31

Exhibit No. XIV—(Continued.)

Filing Date		Instrument	File No.
Oct. 15, 1936	(364)	Order Authorizing Receiver to Connect Properties with City Water System, and to Sell Existing Water System Supplying Properties and to Sell Pumps and Equipment	31
Oct. 19, 1936	(365)	Petition for Authority to Grant Easement for Power and Telephone Wires (REO 358)	74
" "	(366)	Order Authorizing Receiver to Grant Easement for Power and Telephone Wires (REO 358)	74
" "	(367)	Petition of Henry S. McCluskey, Receiver for Order Authorizing Him to Transmit Abstract to Charles A. McLean, his Co-Ancillary Receiver in Idaho (REO 558 Leaper)	26
" "	(368)	Order Authorizing Henry S. McCluskey, Receiver, to Transmit Abstract to his Co-Ancillary Receiver in Idaho, Charles A. McLean, Esq. (REO 558 —Leaper)	26
" "	(369)	Petition of Henry S. McCluskey for Authority to Transmit Master's Commissioner's Certificate of Sale to Boyd, Receiver in Wyoming	27
" "	(370)	Order Authorizing Henry S. McCluskey to Transmit Master's Commissioner's Certificate of Sale to Boyd, Receiver in Wyoming	27
" "	(371)	Affidavit of Service of Order to Show Cause by Publication (Reo 140—Snow Property sold to Henderson)	16
" "	(372)	Petition for Order Authorizing Sale and Confirmation Thereof, of Real Property in Yuma, Yuma County, Arizona (Reo 140)	16
" "	(373)	Order Authorizing Sale and Confirmation Thereof of Real Property in Yuma (REO 140) (Snow Property to Henderson)	16

Exhibit No. XIV—(Continued.)

Filing Date	Instrument	File No.
Oct. 19, 1936	(374) Petition for Authority to Improve Property	31
" "	(375) Order Authorizing Receiver to Improve Property	31
" "	(376) Petition for Order Authorizing Sale and Confirmation Thereof, of Real Property in Maricopa County, Arizona (REO 123—Temple Property to Aros)	19
" "	(377) Order Authorizing Sale and Confirmation Thereof of Real Property in Maricopa County, Arizona (REO 123 Temple Property sold to Aros)	19
" "	(378) Affidavit of Service of Order to Show Cause by Publication (REO 123)	19
" "	(379) Petition of Receiver Asking for Appointment of Appraisers to Appraise Property in Maricopa County, Arizona	33A
" "	(380) Order Appointing Appraisers to Appraise Property in Maricopa County, Arizona	33A
" "	(381) Affidavit of Service of Order to Show Cause by Publication (REO 359 Rohe Property to Lindblom)	21
" "	(382) Petition for Order Authorizing Sale and Confirmation Thereof, of Real Property in Navajo County, Arizona (REO 359—Rohe Property to Lindblom)	21
" "	(383) Order Authorizing Sale, and Confirmation Thereof, of Certain Real Estate Located in Navajo County, Arizona (REO 359—Rohe Property to Lindblom)	21
" "	(384) Petition of Receiver for Authority to Accept Quit-Claim Deed from Aubrey A. Moody and Mary G. Moody in Lieu of Foreclosure (REL 1668)	22

Exhibit No. XIV—(Continued.)

Filing Date		Instrument	File No.
Oct. 19, 1936	(385)	Order Authorizing Receiver to Accept Quit-Claim Deed from Aubrey A. Moody and Mary G. Moody, his wife, in lieu of Foreclosure (REL 1668)	22
"	" (386)	Petition for Authority to Sell Real Estate in Idaho	26
"	" (387)	Order Confirming Sale of Real Estate by McCluskey and McLean, Co-Ancillary Receivers of Intermountain Building & Loan Association in the State of Idaho	26

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"	" (388)	Petition for Authority to Transmith Abstract to Receiver in Idaho	26
"	" (389)	Order Authorizing Receiver to Transmit Abstract to Receiver in Idaho	26
"	" (390)	Petition for Order Authorizing Receiver to Execute Release of Mortgage on Property Situated in British Columbia	29
"	" (391)	Order Authorizing Receiver to Execute Release of Mortgage on Property Situated in British Columbia, Canada	29
Oct. 26, 1936	(392)	Affidavit of Service of Order to Show Cause by Publication (REO 198—Fickas Property to R. S. Amend)	18
"	" (393)	Petition for Order Authorizing Sale, and Confirmation Thereof, of Real Property in Maricopa County, Arizona (REO 198—Fickas Property to R. S. Amend)	18
"	" (394)	Order Authorizing Sale and Confirmation Thereof of Certain Real Estate in Maricopa County, State of Arizona (REO 198—Fickas Property to Amend)	18

Exhibit No. XIV—(Continued.)

Filing Date		Instrument	File No.
Oct. 19, 1936	(374)	Petition for Authority to Improve Property	31
" "	(375)	Order Authorizing Receiver to Improve Property	31
" "	(376)	Petition for Order Authorizing Sale and Confirmation Thereof, of Real Property in Maricopa County, Arizona (REO 123—Temple Property to Aros)	19
" "	(377)	Order Authorizing Sale and Confirmation Thereof of Real Property in Maricopa County, Arizona (REO 123 Temple Property sold to Aros)	19
" "	(378)	Affidavit of Service of Order to Show Cause by Publication (REO 123)	19
" "	(379)	Petition of Receiver Asking for Appointment of Appraisers to Appraise Property in Maricopa County, Arizona	33A
" "	(380)	Order Appointing Appraisers to Appraise Property in Maricopa County, Arizona	33A
" "	(381)	Affidavit of Service of Order to Show Cause by Publication (REO 359 Rohe Property to Lindblom)	21
" "	(382)	Petition for Order Authorizing Sale and Confirmation Thereof, of Real Property in Navajo County, Arizona (REO 359—Rohe Property to Lindblom)	21
" "	(383)	Order Authorizing Sale, and Confirmation Thereof, of Certain Real Estate Located in Navajo County, Arizona (REO 359—Rohe Property to Lindblom)	21
" "	(384)	Petition of Receiver for Authority to Accept Quit-Claim Deed from Aubrey A. Moody and Mary G. Moody in Lieu of Foreclosure (REL 1668)	22

Exhibit No. XIV—(Continued.)

Filing Date		Instrument	File No.
Oct. 19, 1936	(385)	Order Authorizing Receiver to Accept Quit-Claim Deed from Aubrey A. Moody and Mary G. Moody, his wife, in lieu of Foreclosure (REL 1668)	22
"	(386)	Petition for Authority to Sell Real Estate in Idaho	26
"	(387)	Order Confirming Sale of Real Estate by McCluskey and McLean, Co-Ancillary Receivers of Intermountain Building & Loan Association in the State of Idaho	26
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"	(388)	Petition for Authority to Transmith Abstract to Receiver in Idaho	26
"	(389)	Order Authorizing Receiver to Transmit Abstract to Receiver in Idaho	26
"	(390)	Petition for Order Authorizing Receiver to Execute Release of Mortgage on Property Situated in British Columbia	29
"	(391)	Order Authorizing Receiver to Execute Release of Mortgage on Property Situated in British Columbia, Canada	29
Oct. 26, 1936	(392)	Affidavit of Service of Order to Show Cause by Publication (REO 198—Fickas Property to R. S. Amend)	18
"	(393)	Petition for Order Authorizing Sale, and Confirmation Thereof, of Real Property in Maricopa County, Arizona (REO 198—Fickas Property to R. S. Amend)	18
"	(394)	Order Authorizing Sale and Confirmation Thereof of Certain Real Estate in Maricopa County, State of Arizona (REO 198—Fickas Property to Amend)	18

Exhibit No. XIV—(Continued.)

Filing Date		Instrument	File No.
Oct. 26, 1936	(395)	Petition for Order Authorizing Receiver to Sell Real Property at Private Sale, Subject to Confirmation by the Court, and for Order to Show Cause Thereon (Reo 208 — White Property)	24
" "	(396)	Order to Show Cause Why Petition of Receiver for Order Authorizing and Directing Him to Sell Real Estate at Private Sale Should Not be Granted (Reo 208 White Property)	24
" "	(397)	Petition of Henry S. McCluskey, Receiver, for Order Authorizing Him to Transmit Documents to Charles A. McLean, His Co-Ancillary Receiver in Idaho	26
" "	(398)	Order Authorizing Receiver to Transmit Documents to Charles A. McLean His Co-Ancillary Receiver in Idaho (REL 148, 212, 250, 300, 317, 422, 597, 607, 672, 680, 1608)	26
" "	(399)	Petition for Appointment of Appraisers to Appraise Property in Maricopa County (REO 355—Stafford Property)	33A
" "	(400)	Order Appoint Appraisers to Appraise Property in Maricopa County (REO 355)	33A

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" "	(401)	Petition for Appointment of Appraisers to Appraise Property in Maricopa County, Arizona (REO 346)	35A
" "	(402)	Order Appointing Appraisers to Appraise Property in Maricopa County, Arizona, (REO 346)	33A
Nov. 2, 1936	(403)	Petition for Appointment of Appraisers to Appraise Property in Pima County, Arizona (REO 206) (REO 348)	33E

Exhibit No. XIV—(Continued.)

Filing Date		Instrument	File No.
Nov. 2, 1936	(404)	Order Appointing Appraisers to Appraise Property in Pima County, Arizona (REO 206 and 348)	33E
" "	(405)	Petition for Authority to Transmit Abstract to John T. Boyd, Receiver in Wyoming	27
" "	(406)	Order Authorizing and Directing Receiver to Transmit Abstract to John T. Boyd, Receiver in Wyoming	27
" "	(407)	Petition for Order Authorizing Payment of Attorneys Fees to Wilson, Wood & Compton	57
" "	(408)	Order Authorizing Receiver to Pay Attorneys Fees to Messrs Willson, Wood & Compton, Attorneys in Flagstaff	57
" "	(409)	Petition of Receiver to Transmit Abstracts to his Attorneys in Oregon (REL 1755, REO 155, REL 1193)	34
" "	(410)	Order Authorizing and Directing Receiver to Transmit Abstracts to Messrs. Wilson & Reilly, his Attorneys in Oregon	34
" "	(411)	Petition for Order Authorizing Receiver to Sell Real Property at Private Sale, Subject to Confirmation by the Court, and For Order to Show Cause Thereon (Westward Ho Garage —Reo 120)	53
" "	(412)	Order to Show Cause Why Petition of Henry S. McCluskey, Receiver of Intermountain Building & Loan Association, for an Order Authorizing and Directing Him to Sell Real Estate of said Corporation at Private Sale, Should Not Be Granted (Westward Ho Garage—REO 120)	53

Exhibit No. XIV—(Continued.)

Filing Date		Instrument	File No.
Nov. 2, 1936	(413)	Petition for Order Extending Time for Presentation of Claims for Three Months from November 22, 1936	35
" "	(414)	Order Extending Time for Presentation of Claims	35
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" "	(415)	Petition for Appointment of Appraisers to Appraise Property in Maricopa County (S 65 ft of Lot 2, Block 6, Smith Place)	33A
" "	(416)	Order Appointing Appraisers to Appraise Property in Maricopa County, Arizona, (S 65 ft of Lot 2, Block 6, Smith Place)	33A
Nov. 9, 1936	(417)	Receiver's Points and Authorities on Motion for Intervention Filed by Wm. Ebell	N
" "	(418)	Petition for Order Authorizing Receiver to Sell Real Property at Private Sale, Subject to Confirmation by the Court, and for Order to Show Cause Thereon (REO 355—Stafford Property to Weiner)	54
" "	(419)	Order to Show Cause Why Petition of Receiver for an Order Authorizing and Directing Him to Sell Real Estate of said Corporation at Private Sale, Should Not Be Granted (REO 355—Stafford Property sold to Weiner)	54
Nov. 16, 1936	(420)	Petition for Authority to Transmit Abstract etc. to Receiver in Wyoming	27
" "	(421)	Order Authorizing Receiver to Transmit Abstract, etc. to Receiver in Wyoming	27
" "	(422)	Affidavit of Service of Order to Show Cause by Publication (REO 208—White Property to Schott)	24
" "	(423)	Petition for Order Authorizing Sale, and Confirmation Thereof, of Real Property in Yuma County, Arizona (REO 208—White Property to Schott)	24

Exhibit No. XIV—(Continued.)

Filing Date		Instrument	File No.
Nov. 16, 1936	(424)	Order Authorizing Sale and Confirmation Thereof of Certain Real Estate in Yuma County, Arizona (REO 208—White Property sold to Schott)	24
Nov. 20, 1936	(425)	Petition of Receiver for Approval of Bringing Suit and Authorizing Filing of Amended Complaint	62
" "	(426)	Order Approving Bringing of Suit Against M. E. Waddoups and Others, to Set Aside Conveyance of Real Property in Maricopa County, Arizona, and Directing the Filing of an Amended Complaint by said Receiver	62
" "	(427)	Petition for Authority to Transmit Notes, Mortgages, Abstracts, etc. to Receiver in Wyoming	27
" "	(428)	Order Authorizing Receiver to Transmit Notes, Mortgages, Abstracts, etc. to Receiver in Wyoming	27

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Nov. 23, 1936	(429)	Affidavit of Service of Order to Show Cause by Publication (REO 355, Stafford Property to Weiner)	54
" "	(430)	Petition for Order Authorizing Sale, and Confirmation Thereof, of Real Property in Maricopa County, Arizona (REO 355 Stafford Property to Weiner)	54
" "	(431)	Order Authorizing Sale and Confirmation Thereof of Certain Real Estate in Maricopa County, State of Arizona (REO 355—Stafford Property to Weiner)	54
" "	(432)	Petition of Henry S. McCluskey and Chas. A. McLean, Co-Ancillary Receivers of Intermountain Building & Loan Association, in the State of Idaho, for Authority to Sell Real Property in Idaho	26

Exhibit No. XIV—(Continued.)

Filing Date		Instrument	File No.
Nov. 23, 1936	(433)	Order Confirming Sale of Real Estate by Henry S. McCluskey and Charles A. McLean Co-Ancillary Receivers of Intermountain Building & Loan Association in the State of Idaho	26
Nov. 30, 1936	(434)	Motion to Strike the Motion for Order to Show Cause filed by Dorothy Owens	N
" "	(435)	Motion to Strike the Motoin for Order to Show Cause filed by Shrewsbury	N
Dec. 3, 1936	(436)	Report of Offer Made by The Texaco Company for Westward Ho Garage by Receiver	53
Dec. 7, 1936	(437)	Affidavit of Service of Order to Show Cause by Publication (REO 120)	53
" "	(438)	Petition for Order Authorizing Receiver to Sell Real Property at Private Sale, Subject to Confirmation by the Court, and for Order to Show Cause Thereon (REO 206—Dutton to Berry)	55
" "	(439)	Order to Show Cause Why Petition of Receiver for Order Authorizing and Directing Him to Sell Real Estate at Private Sale Should Not Be Granted (REO 206 — Dutton Property to Berry)	55
" "	(440)	Petition for Authority to Transmit Abstracts to Wyoming	27
" "	(441)	Order Authorizing Receiver to Transmit Abstracts to Receiver in Wyoming	27
" "	(442)	Petition for Authority to Improve Property (Loan 2287—Hutson Property)	57
" "	(443)	Order Authorizing Receiver to Improve Property (loan 2287—Hutson Property)	57

Exhibit No. XIV—(Continued.)

Filing Date		Instrument	File No.
Dec. 11, 1936	(444)	Petition for Order Authorizing Sale, and Confirmation Thereof, of Real Property in Maricopa County, Arizona (REO 120)	53
Dec. 14, 1936	(445)	Order Authorizing Sale and Confirmation Thereof of Certain Real Estate in Maricopa County, State of Arizona (REO 120)	53
Dec. 15, 1936	(446)	Petition for Order Authorizing Receiver to Execute Contracts, etc., in Canada	29
" "	(447)	Order Authorizing H. S. McCluskey, Receiver, to execute Contracts relative to Assets in Canada	29
Dec. 18, 1936	(448)	Receiver's Reply to Points and Authorities of William Ebell	
Dec. 21, 1936	(449)	Affidavit of Service of Order to Show Cause by Publication (REO 206)	55
" "	(450)	Petition for Order Authorizing Sale, and Confirmation Thereof, of Real Property in Pima County, Arizona (Reo 206—Dutton Property to Berry)	55
" "	(451)	Order Authorizing Sale and Confirmation Thereof of Certain Real Estate in Pima County, Arizona (REO 206—Dutton Property to Berry)	55
" "	(452)	Petition for Order Authorizing Receiver to Sell Real Property at Private Sale, Subject to Confirmation by the Court, and for Order to Show Cause Thereon REO 126	63
" "	(453)	Order to Show Cause Why Petition of Receiver for Order Authorizing and Directing Him to Sell Real Estate at Private Sale Should Not be Granted (REO 126—Williams Property)	63
Dec 28, 1936	(454)	Petition for Instructions on Offer of Lawrence C Spain and Madeline L Spain his wife, to Compromise Indebtedness	71

Exhibit No. XIV—(Continued.)

Filing Date		Instrument	File No.
Dec. 28, 1936	(455)	Order Authorizing Compromise Settlement with Lawrence C. Spain and Madeline L. Spain, his wife	71
" "	(456)	Petition for Authority to Improve Property	31
" "	(456)	Order Authorizing Receiver to Improve Property	31

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" "	(459)	Petition for Order Authorizing Receiver to Sell Real Property at Private Sale Subject to Confirmation by the Court, and for Order to Show Cause Thereon (REO 357—Cambridge Property to Holmes)	64
" "	(460)	Order to Show Cause Why Petition of Receiver for Order Authorizing and Directing Him to Sell Real Estate at Private Sale Should not be Granted (REO 357—Cambridge Property to Holmes)	64
Jan. 4, 1937	(461)	Petition for Instructions and Order to Execute Deed (REC 161)	65
" "	(462)	Instructions and Order to Execute Deed (REC 161—Court)	65
Jan. 6, 1937	(463)	Petition for Authority to Make Trip to Oregon and Prosecute Action	
" "	(464)	Order Authorizing Receiver to Make Trip to Oregon and Prosecute Action.	
Jan. 11, 1937	(465)	Petition for Authority to Repair and Improve Property (Loan 2124)	31
" "	(466)	Order Authorizing Receiver to Repair and Improve Property (Loan 2124)	31
" "	(467)	Petition for Authority to Repair and Improve Property (REL 2287)	57
" "	(468)	Order Authorizing Receiver to Repair and Improve Property (REL 2287)	57
" "	(469)	Petition on Allowing Attorney's Fees and Ordering Receiver to Pay Same	67
" "	(470)	Affidavit of Service by Publication (REO 126—Williams to Dart)	63

Exhibit No. XIV—(Continued.)

Filing Date	Instrument	File No.
Jan. 11, 1937 (471)	Petition for Order Authorizing Sale, and Confirmation Thereof, of Real Property in Yuma County, Arizona (REO 126—Williams to Dart)	63
" " (472)	Order Authorizing Sale and Confirmation Thereof of Certain Real Estate in Yuma County, Arizona (REO 126 Williams Property sold to Dart)	63
Jan. 18, 1937 (473)	Affidavit of Service of Order to Show Cause by Publication (REO 357) (Cambridge Property to Holmes)	64
" " (474)	Petition for Order Authorizing Sale, and Confirmation Thereof, of Real Property in Maricopa County, Arizona, (REO 357) (Cambridge Property to Holmes)	64

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" " (475)	Order Authorizing Sale and Confirmation Thereof, of Real Property in Maricopa County, Arizona (REO 357) (Cambridge Property to Holmes)	64
Feb. 1, 1937 (476)	Petition for Authority to Pay Loan (Re Loan #4 from The First Trust Co., Lincoln, Nebraska)	30
" " (477)	Order Authorizing Payment of Loan (REL #4 from The First Trust Co., Lincoln, Nebraska)	30
" " (478)	Petition for Authority to Transmit Documents and Papers to Wyoming	
" " (479)	Order Authorizing Receiver to Transmit Documents and Papers to Wyoming	
Feb. 8, 1937 (480)	Petition for Appointment of Appraisers to Appraise Property in Maricopa County (REO 187 and 335)	33A
" " (481)	Order Appointing Appraisers to Appraise Property in Maricopa County Arizona (REO 187 and 335)	33A

Exhibit No. XIV—(Continued.)

Filing Date		Instrument	File No.
Feb. 15, 1937	(482)	Petition for Authority to Accept Quit-Claim Deed of Henry H. Scorse and wife in Lieu of Foreclosure	68
"	" (483)	Order Authorizing Receiver to Accept Quit-Claim Deed of Henry H. Scorse and wife in Lieu of Foreclosure	68
"	" (484)	Petition for Order Authorizing Receiver to Sell Real Property at Private Sale, Subject to Confirmation by the Court, and for Order to Show Cause Thereon (REO 127) (Yuma Sale to V. L. Ward)	69
"	" (485)	Order to Show Cause Why Petition of Receiver for An Order Authorizing and Directing Him to Sell Real Estate of Said Corporation at Private Sale, Should Not Be Granted	69
Mar. 1, 1937	(486)	Affidavit of Service of Order to Show Cause by Publication (REO 127) (Yuma Sale to V. L. Ward)	69
"	" (487)	Petition for Order Authorizing Sale, and Confirmation Thereof, of Real Property in Yuma County, Arizona (REO 127—V. L. Ward)	69
"	" (488)	Order Authorizing Sale and Confirmation Thereof, of Real Property in Yuma County, Arizona (REO 127—Ward)	69

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Feb. 15, 1937	(489)	Petition for Order Authorizing Receiver to Sell Real Property at Private Sale, Subject to Confirmation by the Court, and for Order to Show Cause Thereon (REO 187—Robert L. Shelpherd)	70
"	" (490)	Order to Show Cause Why Petition of Receiver for an Order Authorizing and Directing Him to Sell Real Estate of Said Corporation at Private Sale, Should Not Be Granted (REO 187)	70

Exhibit No. XIV—(Continued.)

Filing Date		Instrument	File No.
Mar. 1, 1937	(491)	Affidavit of Service of Order to Show Cause by Publication (REO 187)	70
" "	(492)	Petition for Order Authorizing Sale, and Confirmation Thereof, of Real Property in Maricopa County, Arizona (REO 187—Shepherd)	70
" "	(493)	Order Authorizing Sale and Confirmation Thereof, of said Real Property in Maricopa County, Arizona (REO 187)	70
" "	(494)	Petition for Order Authorizing Receiver to Sell Real Property at Private Sale, in Maricopa County, Arizona, Subject to Confirmation by the Court, and for Order to Show Cause Thereof (REO 335)	73
" "	(495)	Order to Show Cause Why Petition of Receiver for an Order Authorizing and Directing Him to Sell Real Estate of said Corporation at Private Sale, Should Not Be Granted (REO 335)	73
" "	(496)	Petition for Appointment of Appraisers to Appraise Property in Maricopa County, Arizona (REO 190—REL 2289)	33A
" "	(497)	Order Appointing Appraisers to Appraise Property in Maricopa County, Arizona, (REO 190—REL 2289)	33A
" "	(498)	Petition for Order Requiring Directors of Intermountain Bldg. & Loan Association to Hold Directors Meeting	N
" "	(499)	Order Directing and Requiring Directors of Intermountain Building & Loan Association to Hold Directors Meeting	N
" "	(500)	Petition for Order Authorizing Sale and/or Exchange of Office Furniture and Equipment	40
" "	(501)	Order Authorizing Sale and/or Exchange of Office Furniture and Equipment	40

Exhibit No. XIV—(Continued.)

Filing Date		Instrument	File No.
Mar. 1, 1937	(502)	Petition for Appointment of Appraisers to Appraise property in Maricopa County, Arizona (REO 358)	33A
" "	(503)	Order Appointing Appraisers to Appraise Property in Maricopa County, Arizona (REO 358)	33A
" "	(504)	Petition for Authority to Execute Quit-Claim Deed in Favor of R. Zahn to Clear Title to Property in the City of Portland	34
" "	(505)	Order Authorizing McCluskey to Execute and Deliver Quit Claim Deed in Order to Clear Title to Lots 11 and 12 in Block 1, Hannun's Addition to the City of Portland	34
" "	(506)	Petition for Authority to Lease Hotel Property at Wellton, Arizona	71
" "	(507)	Order Authorizing Receiver to Lease Hotel Property at Wellton, Arizona	71
" "	(508)	Petition for Authority to Bring Suit Against Fidelity & Deposit Company of Maryland	G
" "	(509)	Order Authorizing Receiver to Bring Suit Against Fidelity & Deposit Co. of Maryland	G
Mar. 8, 1937	(510)	Petition for Order Authorizing Receiver to Sell Real Property at Private Sale, Subject to Confirmation by the Court, and for Order to Show Cause Thereon (REO 358—Kulp Sale)	74
" "	(511)	Order to Show Cause Why Petition of Receiver for an Order Authorizing and Directing Him to Sell Real Estate at Private Sale Should Not Be Granted (REO 358—Kulp Sale)	74
" "	(512)	Petition for Appointment of Appraisers to Appraise Property in Gila County, Arizona (REO 182)	33F

Exhibit No. XIV—(Continued.)

Filing Date		Instrument	File No
Mar. 8, 1937	(513)	Order Appointing Appraisers to Appraise Property in Gila County, Arizone, (REO 182)	33F
" "	(514)	Petition for Order Authorizing Receiver to Sell Real Property at Private Sale, Subject to Confirmation by the Court, and for Order to Show Cause Thereon (REO 190—Dail Sale)	75
" "	(515)	Order to Show Cause Why Petition of Receiver for an Order Authorizing and Directing Him to Sell Real Estate at Private Sale Should Not Be Granted (REO 190—Dail Sale)	75

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" "	(516)	Petition for Order Authorizing Receiver to Sell Real Property at Private Sale, Subject to Confirmation by the Court, and for Order to Show Cause Thereon (REO 308—Waterman Sale)	76
" "	(517)	Order to Show Cause Why Petition of Receiver for an Order Authorizing and Directing Him to Sell Real Estate at Private Sale Should Not Be Granted (REO 308—Waterman Sale)	76
" "	(518)	Petition for Appointment of Appraisers to Appraise Property in Pinal County, Arizona (REO 180)	33G
" "	(519)	Order Appointing Appraisers to Appraise Property in Pinal County, Arizona (REO 180)	33G
" "	(520)	Petition to Modify Order Authorizing Lease of Hotel Property at Wellton, Arizona	71
" "	(521)	Order Authorizing Receiver to Modify Order Authorizing Lease of Hotel Property at Wellton, Arizona	71

Exhibit No. XIV—(Continued.)

Filing Date		Instrument	File No
Mar. 11, 1937	(522)	Order Directing Directors of Intermountain Building and Loan Association to Hold Meeting and Appoint Stanley Jerman Attorney in Fact for Corporation	N
Mar. 15, 1937	(523)	Affidavit of Service of Order to Show Cause by Publication (REO 335—Hooper Sale)	73
Mar. 22, 1937	(524)	Petition for Order Authorizing Sale, and Confirmation Thereof, of Real Property in Maricopa County, Arizona (REO 335—Hooper Sale)	73
"	" (525)	Order Authorizing Sale and Confirmation Thereof of Real Property in Maricopa County, Arizona (Hooper Sale —REO 335)	73
"	" (526)	Petition for Order Authorizing Sale, and Confirmation Thereof, of Real Property in Maricopa County, Arizona (REO 358—Kulp Sale)	74
"	" (527)	Affidavit of Service of Order to Show Cause by Publication (REO 358, Kulp)	74
"	" (528)	Order Authorizing Sale and Confirmation Thereof of Real Property in Maricopa County, Arizona (REO 358 —Kulp Sale)	74

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"	" (529)	Affidavit of Service of Order to Show Cause by Publication (REO 190)	75
"	" (530)	Petition for Order Authorizing Sale, and Confirmation Thereof, of Real Property in Maricopa County, Arizona (REO 190—Dail Sale)	75
"	" (531)	Order Authorizing Sale and Confirmation Thereof of Real Property in Maricopa County, Arizona (REO 190 —Dail Sale)	75

Exhibit No. XIV.—(Continued)

Filing Date		Instrument	File No
Mar. 22, 1937	(532)	Affidavit of Service of Order to Show Cause by Publication (REO 308)	76
"	(533)	Petition for Order Authorizing Sale, and Confirmation Thereof, of Real Property in Maricopa County, Arizona (REO 308—Waterman Sale)	76
"	(534)	Order Authorizing Sale and Confirmation Thereof of Real Property in Maricopa County, Arizona (REO 308—Waterman Sale)	76
"	(535)	Petition for Appointment of Appraisers ot Appraise Property in Maricopa County, Arizona (REO 325)	33A
"	(536)	Order Appointing Appraisers to Appraise Property in Maricopa County, Arizona (REO 325)	33A
"	(537)	Petition for Appointment of Appraisers to Appraise Property in Maricopa County Arizona	
"	(538)	Order Appointing Appraisers to Appraise Property in Maricopa County, Arizona	
"	(539)	Petition for Appointment of Appraisers to Appraise Property in Pinal County, Arizona	
"	(540)	Order Appointing Appraisers to Appraise Property in Pinal County, Arizona	
"	(541)	Petition for Authority to Compromise Indebtedness of C. G. Madrid and wife	6
"	(542)	Order Appointing Appraisers to Appraise Property of C. G. Madrid and wife	6
"	(543)	Inventory and Partial Report No. 2	

Exhibit No. XIV.—(Continued)

Filing Date		Instrument	File No
Mar. 29, 1937	(544)	Petition for Order Authorizing Receiver to Sell Real Property at Private Sale, Subject to Confirmation by the Court, and for Order to Show Cause Thereon	
" "	(545)	Order to Show Cause Why Petition of Receiver for an Order Authorizing and Directing Him to Sell Real Estate at Private Sale Should Not Be Granted	
" "	(546)	Petition for Appointment of Appraisers to Appraise Property in Yuma County, Arizona	
" "	(547)	Order Appointing Appraisers to Appraise Property in Yuma County, Arizona	
Mar. 31, 1937	(548)	Petition for Order Approving and Ratifying Expenditures Heretofore Made on Wellton Hotel Property.....	71
" "	(549)	Order Approving and Ratifying Expenditures Heretofore Made by Receiver on Wellton Hotel Property (Signed April 5, 1937)	71

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EXHIBIT No. XV

MISCELLANEOUS CASES

44001—H. S. McCluskey, versus Waddoups, M. E. et al. (This is a suit to set aside the deed fraudently conveying all of Waddoups' property to Beneficial Investment Company and Beneficial Investment Company to Edward E. Jenkins and Edna T. Jenkins, his wife. Elaborate on this suit as to total

amount, etc., and importance to creditors of association). (Maricopa)

9131—H. S. McCluskey, versus County of Yuma. This is a suit to recover taxes in the sum of $68.72). Judgment was entered February 18, 1937. (Yuma).

H. S. McCluskey, versus Navajo County, et al. This is a suit to recover $516.27. The moneys paid for taxes were misapplied to other lands in Navajo County not owned by this association. (Navajo)

44055—H. S. McCluskey, versus Henderson, Lannas S. et al. Complaint in mandamus filed. (This suit is in regard to taxes paid on the Lynn Lockhart property in the sum of $411.28). (Maricopa)

13766—H. S. McCluskey, versus Short, Thomas R. et al. Foreclosure complaint filed. Interpleader suit filed against H. S. McCluskey and R. O. Barrett to determine ownership of the note and mortgage sought to be foreclosed. (Yavapai)

JUSTICE COURT

H. S. McCluskey, versus Parks, Henry. Complaint filed in West Phoenix Precinct for delinquent rent in the sum of $131.00. No service made on Parks as he is out of the state.

H. S. McCluskey, versus Burnham, W. L. Suit in the justice court at Mesa to recover $23.50 delinquent rent. This case is ready to close.

FEDERAL COURT

E-268 Phoenix—H. S. McCluskey, versus Fidelity & Deposit Company, et al. The original complaint in this suit on the bonds of officers was filed in the Superior Court. Later this suit was moved to the Federal Court.

(Suits filed against H. S. McCluskey, in the main suit.)

E-268 Phoenix—Southwestern Fire Insurance Company versus H. S. McCluskey. This is a suit for offset.

E-268 Phoenix—J. H. Shrewsbury, versus H. S. McCluskey. This is a suit for offset.

E-268 Phoenix—Owens, Preston versus H. S. McCluskey. This is a suit for offset. [176]

42100-a—Y. C. White, as Superintendent of Banks for the State of Arizona, and Receiver of the Intermountain Building and Loan Association of Arizona, a corporation, versus Ralph Murphy, Winifred E. Murphy, et al, and Henry S. McCluskey, received of the Intermountain Building and Loan Association of Utah. H. S. McCluskey was named as party defendant in this suit in order that the plaintiff could get clear title to property set up in this foreclosure complaint.

SUPREME COURT

3780—Forst, Mathilda J. versus H. S. McCluskey. In this case, Mathilda J. Forst recovered judgment against the association after the federal court had taken jurisdiction of the assets. She then garnished

the funds of the association in the Valley National Bank. H. S. McCluskey moved to quash the garnishment. Motion granted. $2300.00 which has been set aside should be restored to the corpus of the estate's funds. Statement of costs for appellee was filed in the Supreme Court in the sum of $121.05. Mathilda J. Forst has filed a claim and the amount of costs should be deducted before any payment is made to her. [177]

[Endorsed]: Rec's Exhibit No. 1 Admitted and Filed Sept. 20, 1937.

[Endorsed]: Filed Sep. 3, 1937. [178]

[Title of District Court and Cause.]

ORDER APPROVING FINAL ACCOUNT OF HENRY S. McCLUSKEY, RECEIVER OF INTERMOUNTAIN BUILDING AND LOAN ASSOCIATION; GRANTING HIS PETITION FOR DISCHARGE AND EXEMPTING HIS BOND; AND ORDER EXTENDING TIME FOR FIXING AND ALLOWING COMPENSATION

Henry S. McCluskey having filed herein his final account and report as Receiver of Intermountain Building and Loan Association, a corporation, together with his petition for discharge and the exoneration of his bond and the allowance to him of additional compensation; and an order to show cause having been issued thereon, service of which

has been duly made by delivering a copy thereof, together with a copy of said final account and report to Harry W. Hill, Receiver of Intermountain Building and Loan Association, a corporation, and by delivering to James R. Moore, Attorney of record in this action for defendant, Intermountain Building and Loan Association, a copy of said order and a copy of said final account and report, and upon all creditors and parties interested in these proceedings by publishing said order to show cause twice in the Arizona Republic, a newspaper of general circulation published in Phoenix, Arizona; all being done in accordance with said order to show cause issued by this Court on the 3rd day of September, 1937, wherein the time was fixed for [179] a hearing upon said final account and report and petition of said Henry S. McCluskey on the 20th day of September, 1937.

And said matter coming on regularly for hearing on said 20th day of September, 1937 and no objection having been filed to said account, report and petition, and the Court having examined said account and report, and the said Henry S. McCluskey having introduced testimony as to the reasonable value of his services as Receiver, and the Court having taken said matters under advisement and now being advised in the premises,

It Is Ordered and Decreed, that said final account and report is approved and allowed, and

It Is Further Ordered, that the petition of said Henry S. McCluskey praying that he be discharged as such Receiver and his bond exonerated is hereby

granted, and he is discharged as such Receiver and his bond exonerated.

In reference to petitioner's request for an immediate allowance to him of additional compensation, the Court is of the opinion that such suggestion is clearly inadmissable at this time.

Assets of the corporation, to a large amount consisting of both real and personal property, will have to be converted into cash and properly applied and distributed before the termination of the receivership, and it is impossible, at this stage of the proceedings, to foresee with any degree of accuracy, what questions or complications may arise in the case before it reached a conclusion. Future contingencies, at present undeterminable, will undoubtedly arise directly related to the acts of petitioner as Receiver. When these are realized they must, of necessity, enter into and largely control any fair and equitable allowance. A final adjustment of compensation, at the close [180] of the receivership, will afford ample opportunity for the allowance to petitioner of any excess of value of his services over the amount he has already received, and at the same time will insure to creditors of the estate an allowance of only such fees as shall be fair and just to them.

The Court, therefore, reserves action on petitioner's claim for additional compensation until the conclusion of the suit. It is so ordered.

Dated this 12th day of October, 1937.

DAVE W. LING

Judge

[Endorsed]: Filed Oct 12 1937. [181]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Thomas W. Nealon, having filed herein his verified petition for allowance of attorney's fees for legal services rendered and expenses incurred in the preparation, institution and trial of the above entitled suit, wherein he prayed that this Court allow to him as solicitor for the plaintiffs such sum as it should deem reasonable compensation to him for his services rendered in connection with the preparation, institution and trial of said cause, including the services rendered by him on the appeal from the interlocutory decree rendered therein to the Ninth Circuit Court of Appeals, and for his services in opposing the petition of the defendant and J. A. Malia to the Supreme Court of the United States for a writ of certiorari to review the proceedings in the District Court and Circuit Court of Appeals, such allowance to be on the basis of one-half of such sum as the Court may find to be a reasonable sum for all legal services rendered by the solicitors for the plaintiffs in the premises, and for an allowance of out-of-pocket expenses necessarily incurred by said petitioner in the premises; and that

this Court establish and fix a lien upon the assets now in the hands of the Receiver of the Intermountain Building & Loan Association, an Utah corporation, for such allowance as it may make to said petitioner upon said petition for services rendered and expenses incurred, and that said Receiver be authorized and directed to pay the amount of such allowances to said petitioner from the fund of the receivership estate now in his possession, and that each of the 2,792 creditors of said Association who have elected to accept the benefit of said petitioner's efforts bear their proportion of such allowance; and that in the event this Court should deem it inadvisable at this time to pay to said petitioner the full amount which he would be entitled to for his services as solicitor for the plaintiffs in said proceedings, that the Court made an allowance to said petitioner for the amount of the out-of-pocket expenses incurred by him and an allowance upon account of the services rendered by him; and the Court being fully advised in the premises,

It Is Hereby Ordered that the defendant in the above entitled suit and all of its creditors, Harry W. Hill, Esq., Receiver of the defendant corporation, and all persons interested in said suit file with this Court in the office of the Clerk of this Court at Phoenix, Arizona, any objections they may have to the granting of said petition on or before twelve days from the date hereof, and it is further ordered that said petition of said Thomas W. Nealon be heard upon its merits on the 15 day of November,

1937, at 10 o'clock A.M., or as soon thereafter as the parties can be heard.

It Is Further Ordered that service of this order be made upon Harry W. Hill, Esq., Receiver of Intermountain Building & Loan Association, *and* Utah corporation, by delivering to and leaving with said Harry W. Hill, Esq., a true copy hereof, together with a true copy of said petition, at his office, No. 313 Luhrs Building, Phoenix, Arizona, and also upon his counsel of record Alexander B. [227] Baker, L. B. Whitney and Lawrence L. Howe, at their offices in the Luhrs Tower, Phoenix, Arizona.

It Is Further Ordered that service of this order be made upon the defendant, Intermountain Building & Loan Association, a corporation, by delivering to and leaving with James R. Moore, Esq., attorney of record in this suit for said defendant, at his office in the City of Phoenix, Arizona, a true copy of this order, together with a true copy of said petition.

It Is Further Ordered that service of this order be made upon all creditors of the Intermountain Building & Loan Association, an Utah corporation, and upon all parties interested in said proceeding, by publishing this order 2 times in the Arizona Republic, a newspaper of general circulation, published in Phoenix, Maricopa County, Arizona.

Dated at Phoenix, Arizona, this 15 day of October, 1937.

DAVE W. LING
Judge of United States
District Court

Received copy of Order to Show Cause to which is attached copy of Petition of Thomas W. Nealon for Allowance of Attorney's Fees for Legal Services Rendered and Expenses Incurred in the Preparation and Trial of the above Entitled Suit, this 15 day of October, 1937.

JAMES A. MOORE
Attorney for Defendant Intermountain Building & Loan Association
HARRY W. HILL
Receiver of Intermountain Building & Loan Association
BAKER & WHITNEY
LAWRENCE L. HOWE
Attorneys for Receiver

[Endorsed]: Filed Oct 15 1937. [228]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE OF ORDER TO SHOW CAUSE

State of Arizona,
County of Maricopa—ss.

Thomas W. Nealon, being first duly sworn on oath, deposes and says:

That on the 15th day of October, 1937, he received from the above named court an Order to Show Cause in the above entitled action issued on said 15th day of October, 1937.

That in accordance with the terms of said Order to Show Cause he duly served the same upon all creditors of the Intermountain Building & Loan Association, an Utah corporation, and upon all parties interested in said proceedings, by causing a true copy of said Order to Show Cause to be published two times in the Arizona Republic, a newspaper of general circulation published in the City of Phoenix, Maricopa County, Arizona, towit, on the 16th and 17th days of October, 1937; that attached hereto and made a part hereof is the affidavit of publication of said Order to Show Cause made by Chas. A. Caldwell, Assistant Cashier and Agent of the Arizona Publishing Company, publishers of the Arizona Republic, to which is attached a true copy of said Order to Show Cause.

THOMAS W. NEALON

Subscribed and sworn to before me this 18th day of December, 1937.

[Seal] EMMA P. HOWEY
Notary Public

My Commission Expires: April 9, 1941. [229]

State of Arizona,
County of Maricopa—ss.

Chas. A. Caldwell, being first duly sworn upon oath deposes and says:

That he is the Assistant Cashier and agent of the Arizona Publishing Company, publishers of Arizona Republic, a newspaper of general circulation in the County of Maricopa, State of Arizona, published at Phoenix, Arizona, and that the copy hereto attached is a true copy of the advertisement published in the said paper for a period of Two days, as follows: October 16, 17, 1937.

CHAS. A. CALDWELL
Assistant Cashier and Agent.

Subscribed and sworn to before me this 17th day of October A.D. 1937.

[Seal] C. O. PHILLIPS
Notary Public

My Commission Expires October 8, 1938.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Thomas W. Nealon, having filed herein his verified petition for allowance of attorney's fees for legal services rendered and expenses incurred in the preparation, institution and trial of the above entitled suit, wherein he prayed that this Court allow to him as solicitor for the plaintiffs such sum as it should deem reasonable compensation to him

for his services rendered in connection with the preparation, institution and trial of said cause, including the services rendered by him on the appeal from the interlocutry decree rendered therein to the Ninth Circuit Court of Appeals, and for his services in opposing the petition of the defendant and J. A. Malia to the Supreme Court of the United States for a writ of certiorari to review the proceedings in the District Court and Circuit Court of Appeals, such allowance to be on the basis of one-half of such sum as the Court may find to be a reasonable sum for all legal services rendered by the solicitors for the plaintiffs in the premises, and for an allowance of out-of-pocket expenses necessarily incurred by said petitioner in the premises; and that this Court establish and fix a lien upon the assets now in the hands of the Receiver of the Intermountain Building & Loan Associa- [230] tion, an Utah corporation, for such allowance as it may make to said petitioner upon said petition for services rendered and expenses incurred, and that said Receiver be authorized and directed to pay the amount of such allowances to said petitioner from the fund of the receivership estate now in his possession, and that each of the 2,792 creditors of said Association who elected to accept the benefit of said petitioner's efforts bear their proportion of such allowance; and that in the event this Court should deem it inadvisable at this time to pay to said petitioner the full amount which he would be entitled to for his services as solicitor for the plaintiffs in said proceedings, that the Court

make an allowance to said petitioner for the amount of the out-of-pocket expenses incurred by him and an allowance upon account of the services rendered by him; and the Court being fully advised in the premises,

It Is Hereby Ordered that the defendant in the above entitled suit and all of its creditors, Harry W. Hill, Esq., Receiver of the defendant corporation, and all persons interested in said suit file with this Court in the office of the Clerk of this Court at Phoenix, Arizona, any objections they may have to the granting of said petition on or before twelve days from the date hereof, and it is further ordered that said petition of said Thomas W. Nealon be heard upon its merits on the 15 day of November, 1937, at 10 o'clock A.M., or as soon thereafter as the parties can be heard.

It Is Further Ordered that service of this order be made upon Harry W. Hill, Esq., Receiver of Intermountain Building & Loan Association, an Utah corporation, by delivering to and leaving with said Harry W. Hill, Esq., a true copy thereof, together with a true copy of said petition, at his office, No. 313 Luhrs Building, Phoenix, Arizona, and also upon his counsel of record Alexander B. Baker, L. B. Whitney and Lawrence L. Howe, at their offices in the Luhrs Tower, Phoenix, Arizona.

It Is Further Ordered that service of this order be made upon the defendant, Intermountain Building & Loan Association, a corporation, by delivering to and leaving with James R. Moore, Esq., at-

torney of record in this suit for said defendant, at his office in the City of Phoenix, Arizona, a true copy of this order, together with a true copy of said petition.

It Is further Ordered that service of this order be made upon all creditors of the Intermountain Building & Loan Association, an Utah corporation, and upon all parties interested in said proceeding, by publishing this order 2 times in the Arizona Republic, a newspaper of general circulation, published in Phoenix, Maricopa County, Arizona.

Dated at Phoenix, Arizona, this 15 day of October, 1937.

DAVE W. LING
Judge of United States
District Court

[Endorsed]: Filed Dec 20 1937. [231]

[Title of District Court and Cause.]

MINUTE ENTRY

of Monday, December 20, 1937 (Phoenix Division)

Honorable Dave W. Ling, United States District Judge, Presiding

Petition of Thomas W. Nealon for Allowance of Attorneys Fees and Petition of Elizabeth G. Monaghan for Allowance of Attorneys Fees come on regularly for hearing this day.

Thomas W. Nealon, Esquire, is present in his own behalf. The petitioner Elizabeth Monaghan is

present with her counsel, J. H. Morgan, Esquire. and

It Is Ordered that said petitions for allowance of attorneys fees be consolidated for hearing.

Thomas W. Nealon, Esquire, now makes introductory statement to the Court in his own behalf, and hearing is now duly had on said petition of Thomas W. Nealon.

The following exhibits of Petitioner Thomas W. Nealon are now admitted in evidence:

1. Certified copy of Decree in similar case from District of Delaware.

2. Certified copy of Order fixing attorneys fees in similar case from the Southern District of California.

Thomas W. Nealon is now sworn and examined in his own behalf.

The following exhibits of Petitioner Thomas W. Nealon are now admitted in evidence:

3. Petition of Thomas W. Nealon for Allowance of Attorney's Fees for Legal Services Rendered and Expenses Incurred in the Preparation and Trial of the Above Entitled Suit.

4. Deposition of William H. Burges.

5. Notice of Taking of Deposition, Affidavit of Service of Notice of the Taking of Depositions, and Deposition of Samuel L. Pattee.

6. Paid Bills and Checks in this Case.

7. Certified copy of Complaint in Intervention, Exceptions of Intervenors, Mary B. Cummings and F. Irene Wilkie to Audit of Lee & Garrett Filed herein, and Dismissal of Suit in Case No. 36306-E,

James M. Meason, et al, vs. First National Building and Loan Association, et al, and Mary B. Cummings and Irene Wilkie, Intervenors; and Letter from Mary B. Cummings.

The following witnesses are now sworn and examined on behalf of the Petitioner Thomas W. Nealon:

M. J. Dougherty
J. S. Jenckes

The Petitioner Thomas W. Nealon rests.

Hearing is now duly had on the Petition of Elizabeth G. Monaghan for Allowance of Attorneys Fees. [232]

Elizabeth G. Monaghan is now sworn and examined in her own behalf.

Exhibit A, Power of Attorney, of Petitioner Elizabeth G. Monaghan is now admitted in evidence.

John L. Gust is now sworn and examined on behalf of the petitioner Elizabeth G. Monaghan.

Exhibit B, Petition of Elizabeth G. Monaghan for Allowance of Attorneys' Fees, of Elizabeth G. Monaghan is now admitted in evidence.

Counsel for petitioner Elizabeth G. Monaghan now states that said petitioner adopts the testimony of witnesses on behalf of Thomas W. Nealon's Petition insofar as it concerns the Petition of Elizabeth G. Monaghan.

The following witnesses are now sworn and examined on behalf of the petitioner Elizabeth G. Monaghan:

Francis D. Crable
E. S. Clark
Henry S. McCluskey
James A. Smith
Ralph E. Sperry

The Petitioner Elizabeth G. Monaghan rests.

Thomas W. Nealon, Esquire, now files his Petition for Payment of Out-of-Pocket Expenses Paid by Petitioner Thomas W. Nealon, and Petition for Allowance and Payment of $12,500.00 upon Account to Thomas W. Nealon, and submits said petitions to the Court, and J. H. Morgan, Esquire, now moves for the immediate payment of $301.65 expenses to Elizabeth G. Monaghan in the event any immediate payments are allowed by the Court, and

It Is Ordered that all of said matters be submitted and by the Court taken under advisement.

[233]

[Title of District Court and Cause.]

PETITION FOR PAYMENT OF OUT-OF-POCKET EXPENSES PAID BY PETITIONER, THOMAS W. NEALON

Comes now Thomas W. Nealon, and respectfully petitions the Court for an order directing the Receiver of the Intermountain Building & Loan Association to pay to him the sum of $1330.40 for out-of-pocket expenses heretofore paid by him for

the benefit of the class plaintiffs in the preparation and conduct of the above entitled suit.

This petition is based upon, and is supplementary to the petition heretofore filed by him in this matter for the allowance of fees and expenses, together with the evidence this day presented in Court.

THOMAS W. NEALON

[Endorsed]: Filed Dec 20 1937. [234]

[Title of District Court and Cause.]

PETITION FOR ALLOWANCE AND PAYMENT OF $12,500.00 UPON ACCOUNT OF FEES TO THOMAS W. NEALON.

Comes now Thomas W. Nealon, and supplementing his verified petition for attorneys fees heretofore filed in the above entitled matter, respectfully petitions the Court for an order making an immediate allowance and payment of $12,500.00 upon account of fees for services rendered the plaintiffs in the preparation and conduct of the above entitled suit.

This petition is based upon and is supplementary to the petition for attorney's fees heretofore filed by him in this matter, together with the evidence this day presented in Court in support thereof. This petition to be without prejudice to the allowance heretofore prayed for in this proceedings.

THOMAS W. NEALON

[Endorsed]: Filed Dec 20 1937. [235]

[Title of District Court and Cause.]

MINUTE ENTRY

of Friday, February 18, 1938 (Phoenix Division)

Honorable Dave W. Ling, United States District Judge, Presiding

ORDER FOR ALLOWANCE AND PAYMENT OF ATTORNEY'S FEES FOR LEGAL SERVICES RENDERED

Thomas W. Nealon, formerly one of the attorneys for Henry S. McCluskey, the former Receiver of Intermountain Building & Loan Association, an Utah corporation, having heretofore presented and filed his verified petition praying, among other things, for the allowance of attorney's fees for legal services rendered by him in the preparation, institution and trial of the above entitled and numbered cause, and an order to show cause having been made and entered by this Court in the above entitled and numbered proceeding under date of October 15, 1937, requiring and directing publication thereof, and said publication and service having been made in the manner and for the time as fixed and prescribed in said order to show cause, and thereafter said verified petition having come on regularly for hearing and witnesses having been sworn and examined and evidence introduced, and the evidence being closed, the matter was submitted and taken under advisement.

It Is Now Ordered and Directed that there shall be and there is hereby allowed to the said Thomas

W. Nealon the sum of Five Thousand Dollars ($5,000.00) as and for an allowance on account of services rendered by him as an attorney in the preparation, institution and trial of the foregoing entitled and numbered cause, said sum to be paid out of the funds now held by Harry W. Hill, the primary Receiver of Intermountain Building & Loan Association.

It Is Further Ordered that the said Harry W. Hill, Receiver of Intermountain Building & Loan Association, an Utah corporation, be and he is hereby authorized, empowered and directed to pay to the said Thomas W. Nealon the said sum of Five Thousand Dollars ($5,000.00) as and for an allowance on account of services heretofore rendered and performed by the said Thomas W. Nealon in the preparation, institution and trial of the foregoing entitled and numbered cause.

It Is Further Ordered that this Court does hereby retain jurisdiction to make and enter such other and further order in the premises as to it shall seem just and equitable.

Done in open court this 18 day of February, 1938.

DAVE W. LING

Judge of the District Court of the United States in and for the District of Arizona. [236]

[Title of District Court and Cause.]

MINUTE ENTRY

of Friday, March 3, 1939 (Phoenix Division)

Honorable Dave W. Ling, United States District Judge, Presiding

ORDER FOR ALLOWANCE AND PAYMENT OF ATTORNEY'S FEES FOR LEGAL SERVICES RENDERED.

Thomas W. Nealon, formerly one of the attorneys for Henry S. McCluskey, the former Receiver of Intermountain Building & Loan Association, an Utah corporation, having heretofore presented and filed his verified petition praying, among other things, for the allowance of attorney's fees for legal services rendered by him, and an order to show cause having been made and entered by this Court in the above entitled and numbered proceeding, under date of October 15, 1937, requiring and directing service and publication thereof, and said publication and service having been made in the manner and for the time as fixed and prescribed in said order to show cause, and thereafter said verified petition having come on regularly for hearing and witnesses having been sworn and examined and evidence introduced, and the evidence being closed, the matter was submitted and taken under advisement; and

Whereas, under date of February 18, 1938, an order was made and entered herein allowing to the said Thomas W. Nealon the sum of Five Thousand Dollars ($5,000.00) as and for an allowance on

account of services rendered by him as an attorney in the preparation, institution and trial of the foregoing entitled and numbered cause, said sum to be paid to him out of the funds held by Harry W. Hills, the primary Receiver of Intermountain Building & Loan Association.

It Is Ordered that the additional sum of Two Thousand Five Hundred Dollars ($2,500.00) is hereby allowed to the said Thomas W. Nealon on account of professional services rendered by him, said sum to be paid out of the funds now held by Harry W. Hill, the primary Receiver of Intermountain Building & Loan Association, an Utah corporation.

It Is Further Ordered that the said Harry W. Hill, Receiver of Intermountain Building & Loan Association, an Utah corporation, be and he is hereby authorized, empowered and directed to pay to the said Thomas W. Nealon, the additional sum of Two Thousand Five Hundred Dollars ($2,500.00) as and for an allowance on account of services heretofore rendered and performed by the said Thomas W. Nealon in the preparation, institution and trial of the foregoing entitled and numbered cause.

It Is Further Ordered that this Court does hereby retain jurisdiction to make such other and further order in the premises as to it may seem just and equitable.

Done in open court this 3 day of March, 1939.

DAVE W. LING

Judge. [237]

[Title of District Court and Cause.]

PETITION OF THOMAS W. NEALON REQUESTING THIS HONORABLE COURT TO REVIEW AND REHEAR FINAL ORDER FIXING ATTORNEY'S FEES AND EXPENSES OF THOMAS W. NEALON, MADE AND ENTERED HEREIN ON DECEMBER 7, 1942.

Comes now Thomas W. Nealon and respectfully petitions this Honorable Court as follows:

I.

That on October 15, 1937, petitioner filed herein his petition for the allowance of compensation for professional services performed by him, and expenses incurred, in the preparation, institution and trial of the above entitled suit, and on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the interlocutory decree rendered therein appointing a receiver pendente lite, and for services in opposing the petition of defendant and J. A. Malia to the Supreme Court of the United States for a writ of certiorari to review the proceedings granting said interlocutory decree and appointing the receiver pendente lite.

That said petition for compensation and expenses was [240] not contested and came on for hearing on December 20, 1937, and at that time this Court heard and received uncontroverted testimony in support of the petition.

II.

That during all the times mentioned in said petition filed on October 15, 1937, as aforesaid, Henry S. McCluskey was either temporary receiver of defendant by appointment of this Court made by an order entered on April 20, 1934, or was permanent receiver by appointment of this Court made by an order entered on February 8, 1936, except during the period between February 8, 1936 and May 11, 1936, said Henry S. McCluskey and George A. Mauk, by appointment of this Court made by an order entered on said February 8, 1936, were co-receivers of said defendant, and said Henry S. McCluskey continued from May 11, 1936, as receiver until April 1, 1937, at which time Harry W. Hill was appointed receiver, who thenceforward has continued as receiver to and including the time of the filing of this petition.

III.

That at the request of said Henry S. McCluskey, as temporary receiver, and by the order of this Court entered on November 30, 1935, petitioner and Elizabeth G. Monaghan were appointed attorneys for said receiver, and thenceforward during the incumbency of said Henry S. McCluskey, as temporary and permanent receiver, petitioner performed professional services on behalf of said receiver, and on behalf of the above-named plaintiffs who are creditors of defendant, and all other creditors similarly situated, in addition to the services enumerated in the petition filed herein by pe-

titioners on October 15, 1937, as aforesaid, whereby petitioner devoted approximately sixteen months in investigating the business transactions and property ownership of defendant, and in conducting litigation connected [241] therewith, in the State of California, Idaho, Utah, Oregon and Wyoming, and pursuant to that investigation and litigation, and subsequent to the appointment of Henry S. McCluskey as permanent receiver, ancillary receivers in aid of said primary receivership were appointed by orders of courts in the States of Idaho, Utah and Wyoming, and as a result of petitioner's efforts in that behalf, adjusted book-value assets of defendant located in said States of Idaho, Utah and Wyoming, totalling $1,717,983.16, as appears from the report of said Harry W. Hill, receiver herein, filed with this Court on February 23, 1943, have been marshalled and subjected to the payment of defendant's creditors.

IV.

That petitioner, during such period, rendered extensive service requiring many days of study and labor for the purpose of securing ancillary receiverships in the States of California and Oregon, but the United States Courts sitting in said states, as hereafter more particularly appears, refused to appoint ancillary receivers of defendant's business and assets located in said state, and, as a result, the business and assets of defendant situated in those states have been, and now are being, administered by public officials thereof as thereunto authorized by the laws of said states.

V.

That the proceedings for the appointment of an ancillary receiver of defendant in the State of California were instituted in the District Court of the United States for the Southern District of California, Central Division, and from an adverse judgment an appeal was prosecuted to the United States Circuit Court of Appeals for the Ninth Circuit, which affirmed the judgment of the District Court, as appears in 109 Federal (2d) 857, and there entitled: [242]

> "Julius G. Brashear, Charles E. Griggs, and Mrs. Charles E. Griggs, his wife, in their own behalf and in behalf of others similarly situated, and Harry W. Hill, Receiver of Intermountain Building & Loan Association, a corporation, successor to Henry S. McCluskey, and George A. Mauk, Receivers of Intermountain Building & Loan Association, a corporation, Appellants, vs. Intermountain Building & Loan Association, a corporation, Charles G. Johnson, State Treasurer of California, Appellees, No. 9130."

That the said Harry W. Hill, who was at that time the receiver of defendant, and his attorneys, requested petitioner to appear on behalf of plaintiffs and appellants in said proceedings, both in the United States District Court for the Southern District of California, Central Division, and in the United States Circuit Court of Appeals for the Ninth Circuit, and petitioner actively engaged with his co-counsel in the conduct of such proceedings,

including the petition for certiorari to the Supreme Court of the United States to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit affirming the judgment of said United States District Court refusing to appoint an ancillary receiver in the State of California, wherein the petition for certiorari was denied, as reported in 311 U. S. 655.

VI.

That the proceedings for the appointment of an ancillary receiver of defendant in the State of Oregon were instituted in the District Court of the United States for the District of Oregon, and from an adverse judgment an appeal was prosecuted to the United States Circuit Court of Appeals for the Ninth Circuit, which affirmed the judgment of the District Court, as appears in 111 Federal (2d) 805, and there entitled:

> "Guagalupe R. Gallegos and Francesco Gallegos, his wife, and Inga G. Gudmundson, in their own behalf and in behalf of others similarly situated, and Harry W. Hill, Receiver of Intermountain Building & Loan Association, [243] a corporation, Appellants, vs. Lloyd R. Smith, Corporation Commissioner, of the State of Oregon, Appellee, No. 9310."

That the said Harry W. Hill, who was at that time the receiver of defendant, and his attorneys, requested petitioner to appear on behalf of appellants on the appeal to the United States Circuit

Court of Appeals for the Ninth Circuit, and petitioner actively engaged with his co-counsel in the conduct of said appeal to the United States Circuit Court of Appeals for the Ninth Circuit, including the petition for certiorari to the Supreme Court of the United States to review the judgment of the United States Circuit Court of Appeals affirming the judgment of the United States District Court refusing to appoint such ancillary receiver in the State of Oregon, wherein the petition for certiorari was denied, as reported in 311 U. S. 668.

VII.

That petitioner, in connection with the proceedings instituted and conducted in the State of Oregon seeking the appointment of an ancillary receiver in that state, by and with the approval of this Court, and the said Henry S. McCluskey, as receiver, associated with himself in the conduct of such proceedings the firm of Wilson & Reilly, attorneys at law, whose offices were in the City of Portland, Oregon, and this Court allowed to said Wilson & Reilly, as such attorneys, a fee of $7,500.00 for the services rendered in connection with such proceedings.

VIII.

That petitioner thus far has made no claim for services rendered by him in connection with said ancillary proceedings in the States of California, Idaho, Utah, Oregon and Wyoming, and petitioner did not claim, nor did he intend to claim, compensation for such services by the petition filed by [244] him on October 15, 1937, as aforesaid.

IX.

That between December 8, 1935 and April 1, 1937, petitioner investigated and prepared, or assisted in the investigation and preparation of, 549 applications, petitions and orders which were filed in this Court by the said Henry S. McCluskey, either as temporary or permanent receiver, all of which pertained to the administration of the receivership affairs, and all of which necessitated many appearances in this Court by petitioner during said period; and such administrative proceedings in many instances required petitioner to diligently investigate the law and to prepare briefs pertaining thereto, but none of the services which petitioner performed in connection therewith was set forth in the petition filed herein by him on October 15, 1937, and petitioner then made no claim for compensation for such services.

X.

That said petition filed by petitioner herein on October 15, 1937, for the allowance of compensation, as therein set forth and claimed, came on for hearing before this Court on December 20, 1937, whereupon this Court considered said petition, and the testimony offered by petitioner in support thereof, and on December 7, 1942, this Court made and entered its order, which eo nomine was designated a final order, allowing compensation and expenses to your petitioner, and ordering payment thereof, and by said order this Court awarded petitioner the sum of $12,500.00, less the sum of $7,500.00, as said order recited, heretofore paid to petitioner on

account, plus an additional sum of $1,330.40 for expenses which had been incurred by petitioner, and, accordingly, by the conditions of said order, [245] petitioner received for such services, in addition to the sum of $7,500.00 which had theretofore been paid to petitioner, the sum of $5,000.00, plus said sum of $1,330.40. That between December 1, 1935 and April 1, 1937, petitioner had been paid an additional sum of $7,344.00 in monthly payments as and for a drawing account.

XI.

That said order entered herein by this Court on December 7, 1942, awarding compensation and expenses to petitioner, deprived petitioner of just and proper compensation for the services enumerated in the foregoing paragraphs III, IV, V, VI and IX, in that said order provided that said sum of $7,344.00 "is sufficient compensation for petitioner as one of the attorneys for the former receiver, Henry S. McCluskey," and by further providing that said order "is a final allowance and covers all services heretofore rendered by said Thomas W. Nealon, as set forth in his petition and as attorney for the former receiver."

XII.

That notwithstanding petitioner made no claim for compensation for services performed by petitioner, as recited and enumerated in the foregoing paragraphs III, IV, V, VI and IX, but claimed compensation only for services rendered in connec-

tion with the suit instituted for the appointment of a receiver of defendant's business and assets, and for services rendered on the appeal in said suit to the United States Circuit Court of Appeals for the Ninth Circuit, and on the petition for writ of certiorari to the Supreme Court of the United States, as confirmed by the first paragraph of said order made and entered on December 7, 1942, nevertheless, said order purported to fix and adjudge the total compensation payable to petitioner for all services rendered by petitioner, as now set forth, and thereby [246] purported to preclude petitioner from recovering compensation for said additional services rendered by petitioner on behalf of said Henry S. McCluskey, as such receiver, as recited and enumerated in the foregoing paragraphs III, IV, V, VI and IX.

XIII.

That at the time said petition came on for hearing before this Court on December 20, 1937, petitioner, by oral statement made to this Court at that time, explained the purpose of said petition by the following statement:

> "My prayer in the petition is for only one-half of what would be a reasonable fee for the conduct of the case, and my petition differs from that of Mrs. Monaghan in this case, in that I ask that if the Court does not see proper at this time to allow the whole fee, that it make an allowance upon account. I think the latter is proper under the circumstances of the case,

and under the evidence which I shall introduce, that a partial allowance at this time is the only way in which justice can be done to all parties, considering the amount of funds in the hands of the Receiver, the necessity, I might say, of the declaring a dividend, and the fact that it will probably be some time before all of the assets can be converted into cash. At the end of the case, at the end of the hearing I shall ask the right to file motions to that effect, and the petition along with them, so as to bring it directly before the Court, maybe supplemental to the petition already filed."

XIV.

That at the time said petition for the allowance of compensation to petitioner came on for hearing before this Court on December 20, 1937, petitioner, by further oral statement made to this Court at that time, explained and confined the purpose of said petition as follows:

"I am asking for a fee, as one of the solicitors for the plaintiffs in the class suit filed for certain named plaintiffs, and those similarly situated. I am asking the Court to allow me such reasonable compensation for the services rendered to the plaintiffs, and those similarly situated, in connection with the preparation, institution and trial of the case, including services [247] rendered by me on the appeal from the interlocutory decree rendered by the Ninth Circuit Court of Appeals, for my serv-

ices in opposing the petition of the defendant corporation and J. A. Malia in the Supreme Court of the United States, and filed upon a Writ of Certiorari, and for my out-of-pocket expenses necessarily incurred and paid by me in the sum of $1,330.40 and for services in obtaining final decree providing for the conveyance of all the property of the Intermountain Building & Loan Association to the Receiver of the defendant."

XV.

That on December 20, 1937, which was the date said petition filed on October 15, 1937 came on for hearing, and as indicated by verbal statement then made to the court as recited in the foregoing paragraph XIII, petitioner at that time then filed herein a petition in writing, designated and entitled:

"Petition for Allowance and Payment of $12,500.00 Upon Account of Fees to Thomas W. Nealon,"

which petition represented to this Court and received as follows:

"Comes now Thomas W. Nealon and supplementing his verified petition for attorney's fees heretofore filed in the above entitled matter respectfully petitions the Court for an order making an immediate allowance and payment of $12,500.00 upon account of fees for services rendered the plaintiffs in the preparation and conduct of the above entitled suit.

"This petition is based upon and supplementary to the petition for attorney's fees heretofore filed by him in this matter, together with the evidence this day presented in Court in support thereof. This petition to be without prejudice to the allowance heretofore prayed for in this proceeding."

XVI.

That said order entered on December 7, 1942, insofar as it purported to be a final order, and insofar as it denied to petitioner compensation earned by him for all services per- [248] formed by him, as aforesaid, was not within the issues presented by said petition, as appears from said petition and the prayer thereof, and as further appears from the oral statement of petitioner recited in the foregoing paragraphs XIII and XIV, and from the written petition recited in the foregoing paragraph XV, and by reason thereof, this Court was without jurisdiction to render and enter said order as and for a final order awarding total and final compensation due and payable to petitioner for all the services performed by him as aforesaid; and furthermore, in the event said order was and is within the jurisdiction of this Court to render it, said order, by reason of the limitation of the petitions upon which said order was founded, was, and is, an interlocutory administrative order in equity now subject to control and revision by this Court so as to permit the entry of a new or supplementary order herein which allows and awards to petitioner just

and proper compensation for all services performed by petitioner, as set forth in the petition filed by him on October 15, 1937, as supplemented, and in this petition, and by the record herein.

XVII.

That petitioner, from the inception of this suit, and he now is, the solicitor of record for plaintiffs above named, and for 2,792 additional consenting creditors of defendant similarly situated, and by reason of that relationship petitioner, although requested, has refused to represent persons other than said creditors because of the incompatibility of petitioner's duty as between said creditors and other creditors of a different class, and, in this respect, petitioner affirms that he was requested by the law firm of Wilson & Reilly, who assisted petitioner in the conduct of the suit and proceedings for an ancillary receivership in the State of Oregon, as aforesaid, to represent said firm for the purpose of presenting and prosecuting [249] their claim in this Court for compensation for services rendered as associate solicitors in the Oregon proceedings, but by reason of the relationship petitioner bore to said creditors whom petitioner represents, petitioner declined to represent said firm, and, accordingly, other local counsel was employed to represent them in that behalf, and for such services said firm of Wilson & Reilly was allowed and awarded compensation by this Court in the amount of $7,500.00, as aforesaid.

XVIII.

That said Elizabeth G. Monaghan on November 22, 1937, filed her petition for compensation for services performed by her, and this Court, by order likewise entered on December 7, 1942, awarded compensation to said Elizabeth G. Monaghan in the same amount then awarded to petitioner, and said Elizabeth G. Monaghan appealed from said order to the United States Circuit Court of Appeals for the Ninth Circuit, and on January 21, 1944, said Court rendered and entered its decision and judgment therein whereby the order of this Court entered on December 7, 1942, awarding compensation to Elizabeth G. Monaghan, was reversed and remanded to this Court, and by the opinion and judgment of the United States Circuit Court of Appeals for the Ninth Circuit on said appeal it was adjudged that this Court committed error by said order which allowed and awarded compensation to Elizabeth G. Monaghan in the amount therein provided, which is identical in the amount awarded to petitioner, as aforesaid, and the United States Circuit Court of Appeals for the Ninth Circuit adjudged that Elizabeth C. Monaghan, for the services rendered as recited in her petition, was entitled to receive, and should receive, such compensation as to this Court may seem right and proper, but in a sum not less than $50,000.00, and, accordingly, the United States Circuit Court of Appeals for the Ninth Circuit reversed and remanded the case on appeal of Elizabeth G. [250] Monaghan to this Court with instructions to fix her compensation in an amount

as may seem right and proper, but in a sum not less than $50,000.00.

IXX.

That on the appeal of Elizabeth G. Monaghan from the order of this Court entered herein on December 7, 1942, allowing and awarding her compensation for the services performed herein, the said Harry W. Hill, as receiver of the above named defendant, who was the appellee on said appeal to the United States Circuit Court of Appeals for the Ninth Circuit, filed a brief in opposition to the brief of Elizabeth G. Monaghan, and by that brief the said Harry W. Hill, as such receiver, recited the character and extent of the services performed herein by petitioner in support of the correctness of the award made by this Court to Elizabeth G. Monaghan, and, as a conclusion from such recitals, the said Harry W. Hill, as such receiver, correctly and fairly represented to the United States Circuit Court of Appeals for the Ninth Circuit the following:

> "The foregoing tends to show, as Mr. Nealon has stated, that all of the important work on this case from the very beginning was performed by him. It is true that there is testimony by Mrs. Managhan to the effect that Mr. Nealon did not at the beginning of the litigation want to become counsel of record for the creditors. If this is true, it may be surmised that Mr. Nealon wished to be free to be employed as attorney for the Receiver, if one should be appointed.

"But whatever the reason, it was apparent to the Court below and must necessarily be apparent to this Honorable Court from the record, that Mr. Nealon was the dominating spirit and the chief counsel in the litigation that brought the fund into court.

"While it is true that no contest was made by the receiver on the petitions filed by either Mrs. Monaghan or Mr. Nealon as attorneys, and 'no controverting evidnece was offered,' still there is a direct conflict between the petitions filed by Mrs. Monaghan and Mr. Nealon, of which the Judge of the Court below must have taken cognizance. Mrs. Monaghan in her oral testimony did not question the statement of Mr. Nealon that 'all pleadings, briefs, or other business was [251] formulated and dictated by me (Nealon) and prepared in my office,' nor the statement 'all of the expenses of litigation from the time the matter came into my (Nealon's) hands in the early part of 1932, to the time that the Receiver took physical possession in November, 1935, were advanced by me (Nealon) at the time they were incurred or paid.' Nor did Mrs. Monaghan question the fact that '* * * during the early part of 1932 and up to about a week prior to the petition for interlocutory decree in April, 1934, Mrs. Monaghan was in my (Nealon's) employ on a salary, but there never was at any time any partnership between us.' "

Furthermore, appellee again recited in that brief as follows:

> "Viewing this case in the light of the record here, we feel that if the fee in fact was inadequate, and an abuse of discretion on the part of the District Judge, that it should have been Mr. Nealon who was here complaining and not Mrs. Monaghan, because, according to the record here, it was Mr. Nealon who 'bore the brunt of the struggle for the beneficiaries of the trust from the beginning to the end.'"

XX.

That the petition of Elizabeth G. Monaghan filed herein on November 22, 1937, as well as the record of the proceedings on the hearing of the petition of both Elizabeth G. Monaghan, and of petitioner, disclose that the services performed by Elizabeth G. Monaghan were not more extensive or more valuable to the creditors of defendant whom they represented, and to the said Henry S. McCluskey, as such receiver, and to the present receiver, than the services performed on their behalf by petitioner, and, in corroboration thereof, the opinion of the United States Circuit Court of Appeals for the Ninth Circuit, in reversing the final order of this court awarding compensation to Elizabeth G. Monaghan, reviewed the testimony presented to this court in support of the petition for an award of compensation to petitioner, and found the following authentic facts:

> "Appellant's petition and her associate's petition were consolidated for hearing before the United States District Judge, and evidence

concerning the value of services rendered and the expenses incurred was presented. Nealon [252] introduced the opinions of four experienced attorneys as to a reasonable fee. Three thought $200,000.00 a fair and moderate fee for the conduct of the entire litigation; the fourth stated that Nealon alone was entitled to at least $100,000.00. There may be some question as to whether or not the testimony offered specifically upon behalf of Nealon could properly be considered as to Mrs. Monaghan's petition, but the question is more academic than real, for Mrs. Monaghan and three lawyer-witnesses declared that $15,000.00, or $75,-000.00 to each attorney, would be a reasonable award. It should be noted that seven attorneys estimated the reasonable value of the total services rendered as from $200,000.00 down to $150,-000.00. No testimony of a lower sum was introduced. * * *"

XXI.

Petitioner respectfully asserts and claims that the compensation allowed to petitioner by the order of this Court entered on December 7, 1942, as aforesaid, was, and is, wholly inadequate, unconscionable and erroneous, when measured by the extent of such services and the benefits derived therefrom by the creditors of defendant whom petitioner successfully represented, as aforesaid, and as also derived by the said Henry S. McCluskey, as former receiver of defendant, and by the present receiver, particularly as disclosed by the petition for the

allowance of compensation filed by petitioner herein on October 15, 1937, as supplemented, as aforesaid, and by this petition, and by the record in support thereof.

XXII.

That for inasmuch as this Court, by the order entered herein on December 7, 1942, committed errors of law and fact apparent on the record herein, in that said order purported to allow and award total and final compensation to petitioner for all services rendered herein; and for inasmuch as it was not within the jurisdiction of this Court to render and enter said order, in that it was and is beyond the issues upon which it is founded; and for inasmuch as said order is erroneous in that the [253] amount of the allowance and award of compensation to petitioner for such services is wholly inadequate as measured by the time and labor expended by petitioner in performing such services, together with the value of such services, as set forth by petitioner in the petition filed herein on October 15, 1937, and as set forth in this petition, and as appears from the record pertaining thereto, therefore petitioner respectfully asserts that right and equity should now be invoked and interposed by this Court for the purpose of reviewing, rehearing and correcting said order so that an award now shall be made to petitioner for compensation in an amount as may be right and proper.

Wherefore, petitioner respectfully prays:

(a) That the order of this Court entered herein on December 7, 1942, allowing and awarding to petitioner compensation and expenses in the amount therein recited, be vacated for the want of jurisdiction of this Court to render said order, and that a supplemental order be made and substituted therefor by this Court allowing and awarding to petitioner compensation in such amount as now appears from the entire record herein to be right and proper.

(b) That this Court, as in the nature of a bill of review, or by an original bill in equity, review said petition filed herein by petitioner on October 15, 1937, and said order entered herein on December 7, 1942, and upon such review that this Court correct the errors of law and fact apparent in said order, and thereupon allow and award to petitioner compensation in such amount as now appears from the entire record herein to be just and proper.

(c) That this Court grant a rehearing of said order entered herein on December 7, 1942, awarding compensation to petitioner, and upon such rehearing that this Court thereupon allow and award to petitioner compensation in such amount for all services performed by petitioner as now appears from the [254] entire record herein to be just and proper.

(d) That this Court modify and revise said order entered herein on December 7, 1942, so as to allow and award compensation to petitioner for all services performed by petitioner as now ap-

pears from the entire record herein to be just and proper.

(e) That a day be fixed by order of this Court for the hearing of this petition and that said order provide that notice of said hearing be given to said Harry W. Hill, as such receiver.

(f) And for such other and further relief as may appear just and equitable.

THOMAS W. NEALON
Pro se
508 Luhrs Tower
Phoenix, Arizona

LESLIE C. HARDY
Solicitor for Petitioner, Thomas W. Nealon, 1006 Luhrs Tower, Phoenix, Arizona

State of Arizona,
County of Maricopa—ss.

Thomas W. Nealon, being first duly sworn on oath, deposes and says that he is the petitioner above named; that he has read the foregoing petition, knows the contents thereof, and that the same is true both in substance and in fact.

THOMAS W. NEALON

Subscribed and sworn to before me this 20 day of March, 1944.

(Seal) RUBY BELLE STERLING
Notary Public.

My commission expires: 9/22/45. [255]

[Endorsed]: Filed Mar. 31, 1944. [256]

[Title of District Court and Cause.]

AFFIDAVIT OF THOMAS W. NEALON

United States of America,
State of Arizona,
County of Maricopa—ss.

Personally appeared before me the undersigned Notary Public in and for the County of Maricopa, State of Arizona, Thomas W. Nealon, who being duly sworn deposes and says:

1. That the services described herein were rendered by him in the above entitled suit, that no compensation has been paid to him therefor, nor was any petition ever filed therefor, nor hearing noticed or had thereon, that no portion thereof has been paid to deponent other than the sums paid under the order of the Honorable Fred C. Jacobs who as judge of the United States District for the District of Arizona on December 2, 1935 made the order of appointment of deponent as attorney for the receiver, and by order entered on January 28, 1936 fixed the sums payable under the monthly drawing account provided for in said order to the deponent as attorney for the receiver in said proceedings. [257]

2. That immediately upon the making of the order, hereinbefore referred to by Judge Jacobs, this deponent, at the suggestion of Judge Jacobs, and under his instructions in company with the receiver of the said Intermountain Building & Loan Association, Harry S. McCluskey, Esq., went to the States of Utah, Wyoming, Oregon and Cali-

fornia for the purpose of obtaining the appointment of ancillary receivers and instituting ancillary proceedings in each of these states in aid of the receivership in Arizona. In such proceedings he represented the receiver and the entire class of creditors of the association in whose behalf the above entitled suit was brought (such representation being necessary for jurisdictional purposes). Deponent also negotiated with the state officials in charge of building and loan associations for their consent to such ancillary proceedings.

3. That the first step in such proceedings was to obtain such ancillary receivership in the State of Utah which was the home state of the corporation. This effort required two trips to Salt Lake City. The second trip was taken at the instance of the present ancillary receiver in Utah who urged the necessity of deponent's presence there to participate in the conduct of the suit. Such suit was successful and as a result thereof all the assets of the corporation in Utah were brought under the jurisdiction of the District Court of Arizona.

4. That the receiver and this deponent immediately after the hearing at Salt Lake City went to Cheyenne, Wyoming, where, with the assistance of local attorneys, and the consent procured of the State officials of Wyoming, they secured the appointment of an ancillary receiver of the association by the United States District Court of Wyoming in aid of the suit in Arizona. [258]

5. That deponent then went to Portland, Oregon, and in company with the Arizona Receiver, the

preliminary work for the proceedings in the United States District Court of Oregon were formulated, in which proceedings he subsequently appeared for both creditors and receiver, and took part upon the hearing before the Special Master and conducted a large part of the examination of witnesses and later took part in the preparation of the appeal (111 Fed. (2d) 805) to the United States Circuit Court of Appeals for the Ninth Circuit and the preparation of the briefs used in the hearings before that court as well as in the Supreme Court of the United States on the application for a writ of certiorari. In connection with the hearing in Oregon this deponent drafted the complaint used in that suit and associate counsel in Oregon subsequently informed deponent that it was the complaint used in that proceeding.

6. This deponent accompanied by the Arizona receiver then went to San Francisco for consultation with officials of the Home Owners Loan Corporation in regard to the properties of the association in which they were interested and for the purpose of making arrangements with the Home Owners Loan Corporation for the securing of the refinancing of mortgages held by the association. This work contributed to the subsequent refinancing of many loans held by the association and was of great advantage to the receivership estate.

7. This deponent and Henry S. McCluskey, as receiver, then went to Los Angeles, California, to negotiate with the California officials handling the assets of the association in California. This finally

resulted in the Brashear case (109 Fed. (2d) 857) wherein this deponent in connection with Messrs. Zach Lamar Cobb and E. A. Littlejohn, attorneys, of Los Angeles represented all the creditors who have accepted the benefits [259] of the Arizona suits as well as the receiver, and also in the United States Circuit Court of Appeals for the Ninth Circuit and the Supreme Court of the United States. This representation was at the request of Harry W. Hill, Esq., the present receiver, made through his attorneys.

8. That at the instance and request of the attorneys for the present receiver, deponent joined in the settlement and release of the cost and supersed*as* bond of the United States Fidelity & Guaranty Co. made upon the appeal from the interlocutory order in the above-entitled suit, which bond was drawn by deponent and James R. Moore, Esq., one of the attorneys for the appellant. The amount collected on this bond was $12,500.00 which went into the receivership estate, although the bond ran to the appellee-creditors.

9. An important case tried by deponent and his co-counsel was that of Forst v. Intermountain Building & Loan Association, Supreme Court of Arizona, No. 3780, 49 Ariz. 246, 65 P. (2d) page 1379, wherein Forst unsuccessfully sought to establish a lien upon the assets of the association and said Forst case established important principles of law in Arizona in aid of the receivership. On the strength of the decision in the Forst case, other claimants of liens were induced to abandon claims

of liens, all to the advantage of the receivership estate.

10. Another important matter in connection with the receivership which required the attention of defendant was the sale of the Canadian assets from which a considerable sum of money was realized for the receivership estate.

11. Another important proceedings commenced by deponent for the receiver, Henry S. McCluskey, which resulted in a gain of more than $3000. for the receivership estate and culminated in the suit of Hill, Receiver v. Favour & Baker, No. 3993, 52 Ariz. 561, 84 Pac. (2d) 575, wherein the Superior Court judgment [260] was held void because the court had no jurisdiction to render the particular judgment that was rendered by the Superior Court. This cause was handled in the Supreme Court with consummate ability by the attorneys for Receiver Hill.

12. An important matter was the securing of the appointment of Stanley Jerman, Esq. as Special Master (and orders incidental thereto) to secure deeds conveying the properties in California and Oregon to the receiver in order that title might vest in the receiver. Deponent was preparing these deeds in accordance with the statutes of Oregon, California, Utah, Wyoming and Idaho, when his employment as attorney for the receiver was terminated by the court's removal of Henry S. McCluskey, as receiver, and Harry W. Hill, as receiver, accepted quit-claim deeds instead of the

special warranty deeds recommended by your deponent.

13. Deponent did much work in connection with the Idaho receivership but did not go in person to Idaho.

14. That in excess of 500 instruments in the nature of petitions, applications, order and other necessary instruments were prepared by your deponent during the sixteen months period in which he represented the receiver. These required many appearances and hearings before the United States District Court sitting at Phoenix and at Prescott.

15. That deponent was appointed attorney for the receiver by Judge Jacobs, as aforesaid, who fixed a drawing account of $300.00 per month, His Honor estimatting at that time that sixty percent of deponent's time would be required for the work. At the same time His Honor fixed a drawing account of $150.00 per month for office and other necessary expenses, estimated as follows: [261]

	Per Month	60%
Office rental in Luhrs Tower	$ 80.00	$ 48.00
Stenographer's salary ($35. per week)	151.67	91.00
Estimated stationery and sundries	33.33	20.00
Monthly total estimated office expense	$265.00	$159.00

Total monthly allowance drawing account for expenses—60% of $265.00 $159.00

16. That the time consumed in the services set forth in this affidavit consisted of 14 full months, included in which were 68 days of personally conducted suits and hearings in the Supreme Court

of Arizona, the Federal District Courts of Arizona, Wyoming, Oregon and California, and in the state court in Utah, and in the Superior Courts in Maricopa and Gila Counties, Arizona. In addition thereto, there was a large portion of the remaining two months devoted to routine affairs of the association.

17. Deponent's reasons for not incorporating the matters herein set up in his original petition for compensation filed in this suit on October 15, 1937, are as follows:

(a) The matter of services rendered to the receiver, as distinguished from the creditors' suit seeking the appointment of the receiver, was entirely a separate matter, and consequently the petition filed on October 15, 1937 was for services to the petitioning creditors and not to the receiver.

(b) The services rendered to the petitioning creditors set up in the petition filed on October 15, 1937 were properly confined to the services rendered in the original suit, and the services to the said creditors set up herein were for services rendered to such creditors but not then completed.

(c) Insofar as services rendered to the former receiver, Henry S. McCluskey, were compensable, the Court would not have had jurisdiction to fix them without a petition being filed [262] reciting the facts and a hearing thereon.

(d) Deponent relied upon the case of Wallace v. Fisk, 80 Fed. (2d) 897, (page 901) as a correct statement of the procedure to be followed.

(e) No order could be entered upon deponent's petition filed at that time that would constitute a separation of the suit nor dismiss the petitioner or his clients from their duty and from the jurisdiction of the court.

(f) Deponent's interpretation of the law was borne out by the order of this Court of December 7, 1942, for while that order is designated "final order," the text thereof shows that it was not a final order, in that page 3 of said order, lines 4 to 7, discloses that the Court did not consider all the services rendered by deponent in said case, many of which appear of record in this suit. This is also shown on lines 8 to 13 of said page, and on lines 1 and 2 of page 4 of said order. The court clearly confined itself to the contents of the petition as filed.

(g) That several parts of the order of December 7, 1942, appear to have been inadvertently made, for instance, on line 15 of page 3, describing the moneys paid to deponent as attorney for the receiver as "salary", while the order of January 28, 1936, authorizing these payments, describes them as payments on account of a drawing account, thereby reserving final compensation as might be reasonable to be fixed and paid after all services had been rendered and petitioned for.

(i) Likewise that portion of the order appearing on lines 9 to 13, inclusive, of page 4 of said order, where the order is described as final, conflicts with that portion of the paragraph reading "as set forth in his petition." Mrs. Monaghan's compensation as

one of the attorneys for the Receiver was fixed at $250.00 a month and not as a drawing account. In [263] addition, she was furnished by the receiver with an office in the Luhrs Building and a competent stenographer and with stationery, all without expense to her, while deponent furnished his own office, stationery, etc. and a stenographer with years of experience in similar work.

18. That the services rendered by affiant, as set forth in this affidavit, and as separate and apart from the services set forth in the petition filed by affiant on October 15, 1937, are of the reasonable value as follows:

(a) The sum of $7,500.00 for assisting in the preparation and trial of the application for the appointment of an ancillary receiver in the United States District Court for the District of Oregon, including the appeal to the United States Circuit Court of Appeals for the Ninth Circuit which affirmed the order of the United States District Court refusing to appoint the ancillary receiver and the denial by the Supreme Court of the United States of the petition for certiorari to review the judgment of the United States Circuit Court of Appeals.

(b) The sum of $7,500.00 for assisting in the preparation and trial of the application for the appointment of an ancillary receiver in the United States District Court for the Southern District of California, Central Division, including the appeal to the United States Circuit Court of Appeals for the Ninth Circuit which affirmed the order of the

United States District Court refusing to appoint the ancillary receiver, and the denial by the Supreme Court of the United States of the petition for certiorari to review the judgment of the United States Circuit Court of Appeals.

(c) The sum of $10,000.00 for services rendered in [264] assisting in securing the appointment of an ancillary receiver in the State of Utah, which was the state in which defendant was organized, thereby subjecting defendant's books, records and assets to the jurisdiction of the United States District Court for the District of Arizona.

(d) The sum of $5,000.00 for services rendered in assisting the securing of the appointment of an ancillary receiver in the United States District Court for the District of Wyoming, thereby subjecting the assets of defendant located in the State of Wyoming to the jurisdiction of the United States District Court for the District of Arizona, which assets had a total adjusted value of $579,265.74 as of the date of the report and account of the present receiver filed herein on February 23, 1943.

(e) The sum of $500.00 for services rendered in the preparation and trial of the case of Forst v. Intermountain Building and Loan Association, et al, in the Superior Court of Maricopa County, Arizona and in the Supreme Court of Arizona, as reported in Vol. 49 Ariz. 246, 65 Pac. (2d) 1379, whereby the state courts recognized the exclusive jurisdiction of the United States District Court for the District of Arizona to control and admin-

ister the receivership, including the adjudication of creditors' liens.

(f) The sum of $10,000.00 for services rendered over a period of sixteen months as attorney for Henry S. McCluskey, during his tenure as receiver for defendant, which included the preparation and presentation of 549 petitions, applications and orders in connection with the receivership, many of which required investigations [265] of questions of law pertaining thereto; and also including associate services performed at the request of the attorney for the present receiver in recovering the sum of $12,500.00 for the receivership estate upon the supersedeas bond posted upon the appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the interlocutory order issued herein appointing an ancillary receiver; and also for services rendered in the Superior Court of Yavapai County, Arizona, in the case of Favour & Baker v. Hill, Receiver, etc., wherein the judgment of the Superior Court was reversed by the Supreme Court of Arizona upon the holding that the Superior Court was without jurisdiction to enter the particular judgment it did enter, as reported in Vol. 52 Ariz. 561, 84 Pac. (2d) 575; and also for the services rendered in realizing for the receivership estate assets located in Canada; and also for general services rendered to the receiver and to the Court over said period of sixteen months.

19. That the total reasonable value of said services as enumerated and performed by affiant, and

which affiant now claims for such services, as set forth in the foregoing paragraph 18, is the sum of $40,500.00.

20. That this affidavit is filed by deponent in support of his petition filed herein to review and rehear said order entered herein on December 7, 1942.

Dated at Phoenix, Arizona, this 31st day of March, 1944.

(Seal) THOMAS W. NEALON

Subscribed and sworn to before me this 31 day of March, 1944.

RUBY BELLE STERLING
Notary Public

My commission expires 9/22/45. [266]

[Endorsed]: Filed Mar. 31, 1944. [267]

[Title of District Court and Cause.]

ACKNOWLEDGMENT OF SERVICE

The undersigned, attorney for Harry W. Hill, Receiver of the Intermountain Building & Loan Association, a corporation, defendant herein; and the undersigned, attorney for said defendant, do acknowledge that Thomas W. Nealon has served upon and left with them on the date hereof, the following documents:

(1) Petition of Thomas W. Nealon requesting this Honorable Court to review and rehear final

order fixing attorney's fees and expenses of Thomas W. Nealon, made and entered herein on December 7, 1942.

(2) Memorandum of points and authorities in support of petition of Thomas W. Nealon to review and rehear final order fixing attorney's fees and expenses of Thomas W. Nealon made and entered herein on December 7, 1942.

(3) Affidavit of Thomas W. Nealon.

Dated at Phoenix, Arizona, this 31st day of March, 1944.

LOUIS B. WHITNEY,

Attorney for Harry W. Hill, Receiver of Intermountain Building & Loan Association, defendant.

MOORE & SHIMMEL,

Attorney for defendant, Intermountain Building & Loan Association.

By JAMES W. MOORE. [268]

[Endorsed]: Filed Mar. 31, 1944.

[Title of District Court and Cause.]

ANSWER

Comes Now Harry W. Hill, the duly appointed, qualified and acting Receiver of Intermountain Building & Loan Association, a corporation, by his attorney undersigned, and answers the petition of Thomas W. Nealon filed herein on the 20th day of March, 1944, as follows:

FIRST DEFENSE

That the petition shows upon its face that this Court has no jurisdiction over the subject matter of said petition.

SECOND DEFENSE

That the petition shows upon its face that this Court has no jurisdiction of the parties.

THIRD DEFENSE

That the petition fails to state a claim upon which relief can be granted.

FOURTH DEFENSE

1. Admits the allegation of Paragraph I of said petition.

2. Admits the allegations of Paragraph II of said petition. [270]

3. Admits that petitioner and Elizabeth G. Monaghan were appointed attorneys for Henry S. McCluskey on or about the 30th day of November, 1935; alleges that he is without knowledge or information sufficient to form a belief as to the truth of every other allegation contained in Paragraph III of the petition.

4. Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph IV of the petition.

5. Admits that proceedings for the appointment of an Ancillary Receiver of defendant, Intermoun-

tain Building & Loan Association, a corporation, in the State of California were instituted in the District Court of the United States for the Southern District of California, Central Division; admits that from an adverse judgment in said proceedings an appeal was prosecuted to the United States Circuit Court of Appeals for the Ninth Circuit and that said judgment on said appeal was affirmed; denies each and every other allegation contained in said Paragraph V; further answering said Paragraph V, alleges that if any services were performed by petitioner in the cause described in said Paragraph V, they were performed on behalf of the creditors and not on behalf of this answering Receiver and such services, if any, were not requested by this answering Receiver or by his attorneys.

6. Admits that the proceedings for the appointment of an Ancillary Receiver of Intermountain Building & Loan Association in the State of Oregon were instituted in the District Court of the United States for the District of Oregon; admits that from an adverse judgment an appeal was prosecuted to the United States Circuit Court of Appeals for the Ninth Circuit and that the judgment of said District Court was affirmed; denies each and every other allegation contained in Paragraph VI of the petition; further answering said Paragraph VI, this answering Receiver [271] alleges that if any services were performed by petitioner in the cause described in said Paragraph

VI, they were performed on behalf of the creditors and not on behalf of this answering Receiver, and such services, if any, were not requested by this answering Receiver or by his Attorneys.

7. Admits the allegations of Paragraph VII of the petition insofar only as such allegations refer to events and transactions with which petitioner was concerned prior to April 1st, 1937, which events and transactions related solely to the attempt of petitioner to have an Ancillary Receiver appointed in Oregon; denies all other allegations in said Paragraph VII; alleges that petitioner in the proceedings referred to represented two creditors of Intermountain Building & Loan Association, a corporation, to-wit Gallegos and Gudmundsen, and not this answering Receiver.

8. Denies each and every allegation contained in Paragraph VIII of the petition.

9. Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph IX of the petition.

10. Admits that petitioner filed a petition herein on October 15th, 1937, for the allowance of compensation as therein set forth and claimed; admits that said petition duly came on for hearing before this Court on December 20th, 1937; admits that this Court considered said petition and the testimony offered by petitioner in support thereof; alleges that subsequent to the hearing on said petition this Court, on the 21st day of February, 1938, duly entered an order authorizing and directing

this answering Receiver to pay to petitioner $5,000.00 on account of services claimed by petitioner; alleges that thereafter and on March 6th, 1939, this Court entered its further order authorizing and directing the Receiver to pay the petitioner an additional $2,500 [272] on account of services claimed by him; alleges that on December 7th, 1942, this Court made and entered its order designated "Final Order Fixing Attorney's Fees and Expenses and Ordering Payment of Balance to Thomas W. Nealon," by which order it was adjudged and decreed that the total compensation of the petitioner, Thomas W. Nealon, was fixed at $12,500.00, same being one-half (½) of the total compensation fixed and allowed for all services rendered by petitioner and his co-attorney (Elizabeth G. Monaghan), and by which order it was adjudged and decreed that the Receiver of Intermountain Building & Loan Association was authorized, empowered and directed to pay to the said petitioner, Thomas W. Nealon, the sum of $5,000.00 as and for the balance of said $12,500.00 fixed by this Court as final compensation for all services heretofore rendered and performed by said Thomas W. Nealon, and by which order it was further adjudged and decreed that the Receiver be authorized, empowered and directed to pay to said petitioner, Thomas W. Nealon, the additional sum of $1,330.40, being expenses incurred by said petitioner as set forth in his said petition; alleges that in said order it was further adjudged and decreed as follows:

"It Is Further Ordered, Adjudged and Decreed and the Court does hereby Order, Adjudge and Decree that this is a final allowance and covers all services heretofore rendered by said Thomas W. Nealon, as set forth in his said petition and as attorney for the former receiver.

It Is Further Ordered, Adjudged and Decreed, and the Court does hereby Order, Adjudge and Decree that the petitioner, Thomas W. Nealon, have a lien upon the assets of Intermountain Building & Loan Association, an Utah corporation, now in the hands of Harry W. Hill, as receiver of such association, for the said sums of $5,000.00 and $1,330.40 respectively, until such sums are paid; and that each of the creditors of said association who have elected to accept the benefit of said petitioner's efforts bear their proportionate share of such allowance."

Further answering said Paragraph X, it is alleged that [273] said final order covered the sum of $7,344.00 for salary and expenses of petitioner as one of the attorneys for the former Receiver, Henry S. McCluskey, between the dates of December 1st, 1935, and April 1st, 1937; denies that said $7,344.00 mentioned in Paragraph X was for a drawing account and in this behalf alleges that it covered all services rendered as attorney for the former Receiver, Henry S. McCluskey and for his co-receiver, George A. Mauk.

11. Denies that said order entered herein by this Court on December 7th, 1942, awarding compensation and expenses of petitioner, deprived petitioner of just and proper compensation for services enumerated in Paragraphs III, IV, V, VI and IX of his petition, or at all; and in this behalf alleges that no appeal was taken from said final order mentioned in Paragraph 10 of this answer within the time required by law, or at all.

12. Admits the allegations in Paragraph XII of the petition that said order fixed and adjudged the total compensation payable to petitioner for all services rendered by petitioner as set forth in his petition lately filed herein and in this behalf alleges that said order was not a "purported" order but was a final appealable order and that no appeal was taken from said order by petitioner within the time required by law, or at all.

13. Alleges in answer to Paragraphs XIII, XIV and XV that this Court, subsequent to the 20th day of December, 1937, and pursuant to the petitions then on file on behalf of petitioner, entered its first order on February 21st, 1938, allowing $5,000.00 on account, and its second order on March 6th, 1939, allowing $2,500.00 on account, and thereafter on the 7th day of December, 1942, entered its final order fixing attorney's fees and expenses of petitioner and ordering payment thereof and making the same a lien on the assets of Intermountain Building & Loan Association in the hands of the Receiver, and that no appeal [274] was

taken from said final order within the time required by law, or at all.

14. Denies each and every allegation contained in Paragraph XVI of the petition.

15. Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph XVII of the petition.

16. Admits the allegations of Paragraph XVIII of the petition.

17. Admits the allegations of Paragraph XIX of the petition, to the effect that the brief mentioned contained the language set forth in said paragraph; alleges that said brief had no effect, beneficial to this answering Receiver, on said Circuit Court.

18. Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph XX, except the quotation from the opinion of the Circuit Court of Appeals.

19. Denies each and every allegation contained in Paragraph XXI.

20. Denies each and every allegation contained in Paragraph XXII.

FIFTH DEFENSE

1. For a further separate and distinct defense to the petition, this answering Receiver alleges that heretofore to-wit and on the 15th day of October, 1937, petitioner herein filed his petition for the allowance of compensation for professional services

performed by him and expenses incurred, and that thereafter and on the 20th day of December, 1937, the matter came on for hearing, and that evidence was produced, both oral and documentary, and the Court not being fully advised in the premises, took said matter under advisement. [275]

2. Alleges that thereafter and on the 21st day of February, 1938, this Court made an allowance to petitioner of $5,000.00, and ordered and directed the Receiver to pay same and that said amount was paid by said Receiver to the petitioner pursuant to said order; that thereafter on March 6th, 1939, a further order was made allowing petitioner $2,-500.00 and authorizing and directing Receiver to pay said sum to petitioner, which said sum was, by said Receiver, paid to petitioner.

3. Alleges that thereafter and on the 7th day of December, 1942, the Court in the above entitled matter, being the same matter as set forth in the petition lately filed herein, entered its final order and judgment fixing attorney's fees and expenses of petitioner in words and figures as shown by the order dated December 7th, 1942, and on file herein and which is made a part hereof, the same is if set forth herein at length; that said final order has not been set aside, modified or reversed; and that said final order has been fully complied with and satisfied by payment to the petitioner by this answering Receiver of the sum of $6,330.40, covering the items set forth in said final order, to-wit: $5,000.00 as and for balance of final compensation for all services performed by petitioner, and $1,-

330.40 expenses incurred by petitioner. That said payment was made on or about the 10th of December, 1942, by check duly endorsed by petitioner and paid out of the funds of the Receiver of Intermountain Building & Loan Association on the 12th day of December, 1942.

SIXTH DEFENSE

For a further separate and distinct defense to the petition, this answering Receiver alleges that prior to the filing of the petition herein and on or about the 10th day of December, 1942, in accordance with a final order of Court entered in the above entitled matter on the 7th day of December, 1942, the Receiver paid to petitioner, and the petitioner accepted from the [276] Receiver, $6,-330.40 in full satisfaction of the claim or claims alleged in said petition.

SEVENTH DEFENSE

For a further separate and distinct defense to the petition, this answering Receiver alleges that heretofore to-wit and on the 7th of December, 1942, petitioner recovered a judgment or final order for attorney's fees and expenses; that no appeal was taken from said judgment or final order within the time required by law, or at all; that petitioner without complaint and with full knowledge of the character of said judgment or final order, has accepted and retained the pecuniary benefits thereunder in that on or about the 10th day of Decem-

ber, 1942, petitioner requested of and accepted from the Receiver, a voucher check in words and figures as follows, to-wit:

Harry W. Hill, Receiver for

INTERMOUNTAIN BUILDING & LOAN ASSOCIATION
Phoenix, Arizona No. 3999

Date December 10, 1942

Pay to the order of THOMAS W. NEALON.....$6,330.40
The Sum of $6330 and 40 Cts. Dollars

INTERMOUNTAIN BUILDING & LOAN ASSOCIATION
By HARRY W. HILL, Receiver

To Valley National Bank
Phoenix, Arizona
91-2 12 Los A.

Do Not Detach—This check will not be paid if voucher is detached or altered

Date or Invoice No.	Items	Amount	Total
B-202	Final Payment in Full Settlement of Attorney Fees Per Order of Court of December 7, 1942	$5,000.00	
	Expenses Allowed Per Order of Court of December 7, 1942	1,330.40	
			$6,330.40

2M 5-41 A.P.

By GHD
Correct-Auditor

with check contained an endorsement provision which was duly en- [277] dorsed by the petitioner in words and figures as follows:

Endorsement

Endorsement of this check acknowledges payment in full for all of the invoices listed on the voucher on the reverse side of this check

THOMAS W. NEALON

That petitioner cashed said check and received the proceeds thereof and retained same.

Wherefore, Receiver having fully answered, prays that the petition herein be denied and dismissed and that he have his costs and such other relief as may be meet in the premises.

LOUIS B. WHITNEY

Attorney for Harry W. Hill, Receiver of Intermountain Building & Loan Association, 1006 Luhrs Tower, Phoenix, Arizona

Service admitted by receipt of copy this 8th day of May, 1944.

LESLIE C. HARDY

Atty. for Petitioner.

[Endorsed]: Filed May 8, 1944. [278]

[Title of District Court and Cause.]

ORDER FOLLOWING PRE-TRIAL CONFERENCE PURSUANT TO RULE 16 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Pursuant to an order of the Court made and entered on May 8, 1944, in the matter of the petition of Thomas W. Nealon requesting this Court

to review and rehear the final order fixing attorney's fees and expenses of Thomas W. Nealon, made and entered herein on December 7, 1942, a pre-trial conference of the attorneys for said petitioner, and for Harry W. Hill, receiver for defendant, was held before the Court on May 15, 1944, at which time Leslie C. Hardy, Esq., appeared as attorney for said petitioner, and Louis B. Whitney, Esq., appeared as attorney for said receiver.

Thereupon, said petition, and answer thereto, and other relevant matters, were considered, whereupon the following action was concluded upon:

I.

The allegations of paragraph I of said petition are admitted. [279]

II.

The allegations of paragraph II of said petition are admitted.

III.

The allegations of paragraph III of said petition are admitted, except that counsel for the receiver does not admit that the services performed by petitioner, as therein alleged, were responsible for marshalling and subjecting the book-value assets of the defendant in the amount of $1,717,983.16 to the payment of defendant's creditors, or that such services were in addition to the services enumerated in the petition filed herein by petitioner on October 15, 1937.

IV.

The allegations of paragraph IV of said petition are admitted for the period November 30, 1935 to April 1, 1937, except that counsel for the receiver is not informed of the extent or nature of the services therein claimed by petitioner.

V.

The allegations of paragraph V of said petition are admitted, except that counsel for the receiver denies that the receiver, Harry W. Hill, or his attorneys, requested petitioner to appear on behalf of plaintiffs and appellants in said proceedings. Counsel for petitioner and the receiver agree that prior to the apopintment of Harry W. Hill, as receiver, petitioner appeared of counsel for plaintiffs therein, including Henry S. McCluskey and George A. Mauk, who were then co-receivers of defendant, for the purpose of preparing and instituting said suit in the United States District Court for the Southern District of California, Central Division, and that after the appointment of Harry W. Hill, as receiver, petitioner appeared for the petitioning creditors, and all creditors similarly [280] situated, and not for the said Harry W. Hill, as receiver, in the proceedings in the District Court, and in the United States Circuit Court of Appeals for the Ninth Circuit, and in the Supreme Court of the United States.

VI.

The allegations of pragraph VI of said petition are admitted, with the same exceptions applying to the Oregon proceedings as stated in the foregoing paragraph V applying to the California proceedings.

VII.

The allegations of paragraph VII of said petition are admitted, with the exception that petitioner did not represent Harry W. Hill, as receiver, subsequent to this appointment as such receiver, but that after such time petitioner represented the petitioning creditors, and all creditors similarly situated. Counsel for the petitioner and the receiver agree that the fee paid to Wilson & Reilly, attorneys, was $5,000.00 instead of $7,500.00.

VIII.

The allegations of paragraph VIII of said petition are denied by counsel for the receiver. Counsel for petitioner and receiver agree that the allegations of said paragraph present questions of law for decision of the Court.

IX.

The allegations of paragraph IX of said petition are admitted, with the exception that counsel for the receiver denies that petitioner's services, as therein alleged, were not set forth in the petition filed herein by petitioner on October 15, 1937, and further denies that petitioner made no claim at that time for compensation for such services. [281]

X.

Counsel for receiver admits the allegations of paragraph X of said petition as supplemented by paragraph 10 of the receiver's answer, but denies that said order mentioned in said paragraph 10 was, or is, a final order, or that it adjudged and decreed the total compensation to which petitioner is entitled, or that it covered all services rendered by petitioner as attorney for the former receiver and/or receivers, and petitioner contends that the compensation of $7,344.00 paid petitioner by said order was for a drawing account as ordered by this Court and not for salary.

XI.

The allegations of paragraph XI of said petition are denied by counsel for the receiver. Counsel for petitioner admits that no appeal was taken from said order, but denies that said order was a final appealable order, or that said order is not now subject to review.

XII.

Counsel for receiver admits the allegations of paragraph XII of said petition, as supplemented by paragraph 12 of his answer. Counsel for petitioner asserts the order referred to in said paragraphs was not a final order, but admits no appeal was taken therefrom.

XIII., XIV. and XV.

The allegations of paragraph XIII, XIV and XV are admitted by counsel for the receiver; and

in this behalf, counsel for petitioner admits the allegations of fact set forth in paragraph 13 of receiver's answer, but denies that the order entered by this Court on December 7, 1942, was a final order as claimed by the receiver.

XVI.

The allegations of paragraph XVI of said petition are [282] denied by counsel for the receiver. Counsel for petitioner and the receiver agree that the allegations of said paragraph present questions of law for the consideration of the Court.

XVII.

The allegations of paragraph XVII of said petition are admitted by counsel for the receiver, with the exception that counsel for the receiver and the petitioner agree that the amount of $7,500.00, as alleged therein, should be $5,000.00.

XVIII.

The allegations of paragraph XVIII of said petition are admitted by counsel for the receiver.

XIX.

The allegations of paragraph XIX of said petition (which is corrected by agreement to read "XIX" instead of "IX") are admited by counsel for the receiver.

XX.

The allegations of paragraph XX of said petition are admitted by counsel for the receiver.

XXI.

The allegations of paragraph XXI of said petition are denied by counsel for the receiver. Counsel for the petitioner and the receiver agree that the allegations of said paragraph present questions of law for the decision of the Court.

XXII.

The allegations of paragraph XXII of said petition are denied by counsel for the receiver. Counsel for the petitioner and receiver agree that the allegations of said paragraph present questions of law for the decision of the Court.

XXIII.

Counsel for the receiver denies that petitioner is entitled to the relief claimed by petitioner in the prayer of said petition. [283]

XXIV.

Counsel for the petitioner resists the First Defense, Second Defense and Third Defense of the Receiver's Answer, and asserts that each and all of said pleas are insufficient to constitute defenses to said petition.

XXV.

Counsel for petitioner admits paragraphs numbered 1 and 2 of the Fifth Defense of the Receiver's Answer. Counsel for petitioner admits that this Court on December 7, 1942, made and entered the order referred to in paragraph numbered 3 of said Fifth Defense, but denies that said order is a

final order which deprives petitioner of the right to seek additional compensation as now claimed by petitioner.

XXVI.

Counsel for petitioner admits the allegations of the Sixth Defense of the Receiver's Answer, with the exception that he denies the order of December 7, 1942, is a final order which deprives petitioner of the right to seek additional compensation for the services rendered by him as set forth and claimed by petitioner in said petition.

XXVII.

Counsel for petitioner admits the allegations of the Seventh Defense of said Receiver's Answer, with the exception that he denies the order of December 7, 1942, referred to therein, is a final order. Counsel for petitioner asserts that the acceptance of said check by petitioner, and the payment of the amount thereof to him, did not operate to deprive petitioner of the right to seek additional compensation for the services performed by him as set forth and claimed by petitioner in said petition. Counsel for the petitioner further asserts that the conditions recited in said check did not, and could not, add to or take from the legal effect of said order made and [284] entered by this Court on December 7, 1942.

The Foregoing constituted the action which was taken at said pre-trial conference, and accordingly it is the order of this Court that the same is hereby approved, adopted and ordered filed.

Dated in the City of Phoenix, within said district, this 7th day of June, 1944.

DAVE W. LING
United States District Judge

Approved:

LESLIE C. HARDY
Attorney for Petitioner
LOUIS B. WHITNEY
For the Receiver

[Endorsed]: Filed June 7, 1944. [285]

[Title of District Court and Cause.]

MOTION TO SUBMIT PETITION

Comes now the petitioner, Thomas W. Nealon, and moves the Court for an order or judgment granting to petitioner the relief prayed for by his petition filed herein on March 31, 1944; and that by said order or judgment petitioner be awarded compensation for professional services performed by petitioner as attorney for the creditors herein, and also for professional services performed by petitioner as attorney for the receivers whom petitioner represented herein, and that such award be in an amount as is now just and proper, but in addition to the amount awarded by this Honorable Court to petitioner by its order entered herein on December 7, 1942.

This motion is based upon the petitions filed herein by petitioner on October 15, 1937, as supplemented, and on March 31, 1944, together with all

the records and proceedings herein which pertain to petitioner's claim for compensation for such services.

Dated this 21st day of November, 1944.

THOMAS W. NEALON
Pro se
LESLIE C. HARDY
Attorney for Petitioner,
Thomas W. Nealon [286]

Received copy of this Motion to Submit Petition on this 21st day of November, 1944.

LOUIS B. WHITNEY
By D. J. S.
Attorney for Defendant

[Endorsed]: Filed Nov. 21, 1944. [287]

[Title of District Court and Cause.]

STIPULATION TO SUBMIT ON BRIEFS WITHOUT ORAL ARGUMENT

Comes Now the petitioner, Thomas W. Nealon, by his attorney undersigned, and Harry W. Hill, the duly appointed, qualified and acting Receiver of Intermountain Building & Loan Association, a corporation, by his attorney undersigned, and stipulate and agree that the motion to submit petition filed by Petitioner and the motion for order denying petition and dismissing same filed by Harry W. Hill as Receiver aforesaid, both be sub-

mitted to this Court for decision on the briefs filed and without oral argument, if the Court approves.

Dated at Phoenix, Arizona, this 22 nd day of November, 1944.

LESLIE C. HARDY
Attorney for Petitioner
LOUIS B. WHITNEY
Attorney for Harry W. Hill, Receiver, etc. [288]

ORDER

Upon reading the foregoing stipulation,

It Is Ordered that the motions mentioned therein be and the same are hereby submitted for decision.

Dated at Phoenix, Arizona, this 22nd day of November, 1944.

DAVE W. LING,
Judge of the District Court of the United States

[Endorsed]: Filed Nov. 22, 1944. [289]

[Title of District Court and Cause.]

MOTION FOR ORDER DENYING PETITION AND DISMISSING SAME

Comes Now Harry W. Hill, the duly appointed, qualified and acting Receiver of Intermountain Building & Loan Association, a corporation, by his attorney undersigned, and moves the Court to enter an order denying petitioner's petition filed herein on March 31st, 1944, and dismissing same. This mo-

tion is based on either or all of the following grounds:

(a) That the petition on its face fails to state a claim upon which relief can be granted. (Subdivision (h) Rule 12);

(b) That the Court lacks jurisdiction of the subject matter (Subdivision (h) Rule 12);

(c) That the order entered by this Court on December 7th, 1942, and by the petition sought to be vacated, was a final order and no appeal was taken therefrom within the time required by law, or at all.

(d) That the petition shows on its face that petitioner accepted the benefits of the order of December 7th, 1942, and no appeal could have been taken in any event from such order after its benefits were accepted by petitioner.

(e) That this Court is now without jurisdiction to [290] vacate the order of December 7th, 1942, and is now without jurisdiction to grant a rehearing of said order.

(f) That a bill of review or a bill in the nature of a bill of review does not lie here because petitioner, having accepted the benefits of the order of December 7th, 1942, is estopped from reviewing said order.

(g) That a bill of review or a bill in the nature of a bill of review will not lie to correct errors on the face of the record, if any there are, because such bill was not filed before the time for appeal expired or within six (6) months from the entry of the order of December 7th, 1942.

(h) That, as a matter of law, this Court is with-

out jurisdiction to grant the prayer of the petition.

(i) That, as a matter of law, this movant is entitled, on the pleadings, to an order or judgment denying petition and dismissing same.

Wherefore, Harry W. Hill, as such Receiver, prays the Court for an order denying the petition and dismissing same.

Dated at Phoenix, Arizona, this 22nd day of November, 1944.

LOUIS B. WHITNEY
Attorney for Harry W. Hill,
Receiver, etc.

Received service of the within Motion for Order Denying Petition and dismissing same this 22nd day of November, 1944.

LESLIE C. HARDY
Attorney for Thomas W.
Nealon, Petitioner

[Endorsed]: Filed Nov. 22, 1944. [291]

[Title of District Court and Cause.]

MINUTE ENTRY

Of Wednesday, November 22, 1944
(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, Presiding

It Is Ordered that the Receiver's Motion for an Order Denying the Petition of Thomas W. Nealon

requesting this Honorable Court to review and rehear final order fixing attorney's fees and expenses of Thomas W. Nealon, made and entered herein on December 7, 1942, and dismissing same be and it is granted.

MINUTE ENTRY

Of Friday, November 24, 1944
(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, Presiding

Leslie Hardy, Esquire, moves on behalf of the petitioner, Thomas W. Nealon, that a copy of the printed transcript of record in the United States Circuit Court of Appeals for the Ninth Circuit in the case of Elizabeth G. Monaghan vs. Harry W. Hill, Receiver of the Intermountain Building and Loan Association, an Utah Corporation, No. 10408 be admitted in evidence in support of his petition filed herein on March 31, 1944, and that said exhibit be considered as filed as of the date of the filing of the said petition.

Whereupon, It Is Ordered that said motion be and it is granted. [292]

[Title of District Court and Cause.]

MINUTE ENTRY

Of Wednesday, November 29, 1944
(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, Presiding

Louis Whitney, Esquire, is present on behalf of Harry W. Hill, Receiver of the Intermountain Building & Loan Association, an Utah corporation. Leslie Hardy, Esquire, is present on behalf of the petitioner, Thomas W. Nealon.

Leslie Hardy, Esquire, states that the petitioner, Thomas W. Nealon, desires the record to show that said petitioner declines to amend or plead further in this case.

Subsequently, the following order is entered:

[Title of Cause.]

FINAL ORDER DENYING PETITION AND DISMISSING SAME

Thomas W. Nealon, petitioner herein, having heretofore filed a motion to submit his petition filed herein on March 31st, 1944, which motion was for an order or judgment awarding petitioner compensation for professional services, in addition to the amount awarded by this Court to petitioner by its order entered herein on December 7th, 1942; and Harry W. Hill, the duly appointed, qualified and acting Receiver of Intermountain Building & Loan Association, an Utah corporation, having hereto-

fore filed herein a motion for order denying the said petition of Thomas W. Nealon and to dismiss same; and both parties having stipulated to submit said motions on briefs theretofore filed without oral argument, the Court ordered said motions submitted for decision; and the Court having, on the 22nd day of November, 1944, granted said motion of Harry W. Hill as such Receiver for an order denying petition of Thomas W. Nealon filed March 31st, 1944, and dismissing same, it is

Ordered that the motion filed by Thomas W. Nealon be and the same is hereby denied.

It Is Further Ordered that the motion of Harry W. Hill as Receiver herein for an order denying petition of Thomas W. Nealon and dismissing same be granted.

Now, Therefore, and in consideration of the premises, it is hereby

Ordered, Adjudged and Decreed that the petition of Thomas W. Nealon filed herein on March 31st, 1944, be denied and the same is hereby dismissed with prejudice.

Done in Open Court this 29 day of November, 1944.

DAVE W. LING,
United States District Judge

Approved as to form Nov. 29, 1944.
LESLIE C. HARDY
Attorney for Petitioner
Nealon. [293]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH THOMAS W. NEALON, PETITIONER HEREIN, INTENDS TO RELY ON HIS APPEAL, FILED PURSUANT TO RULE 75 (d) OF FEDERAL RULES OF CIVIL PROCEDURE

I.

The trial court was without jurisdiction or power to enter the order of December 7, 1942 as and for a final order allowing and awarding to petitioner as total compensation the sum of $5,000.00, in addition to the sum of $7,500.00 theretofore received by petitioner for services performed on behalf of petitioning creditors of Intermountain Building and Loan Association, and also on behalf of the Receiver of said Association, for the reason that petitioner requested the court, at the time his petition filed on October 15, 1937 came on for hearing, for a partial award of compensation in the sum of $12,500.00 only, and petitioner then reserved the right to claim additional compensation at a later time, and for the further reason that the pleadings and issues before the court at that time deprived the court of jurisdiction or power to enter the order which the court did enter on December 7, 1942 which purported to allow and award to petitioner total compensation in the sum of $5,000.00, in addition to the sum of $7,500.00 theretofore received by petitioner for such services.

II.

The petition filed by petitioner on October 15, 1937 [294] did not then claim or request an allowance by the trial court of an award for services which petitioner had rendered to the Receiver of Intermountain Building & Loan Association, and therefore the trial court was without jurisdiction or power to enter the order of December 7, 1942 which purported to allow to petitioner, as and for total compensation for all services rendered by petitioner, including the services rendered by petitioner to the receiver of Intermountain Building & Loan Association.

III.

The trial court was without jurisdiction or power to make the particular order entered on December 7, 1942 for the reason that there was no pleading to support said order and that no process was issued thereon and no notice thereof was served upon petitioner so as to support and justify the entry of said order.

IV.

The order entered by the trial court on December 7, 1942, allowing and awarding petitioner as total compensation the amount therein allowed and awarded was, and is, wholly inadequate, unconscionable and erroneous, measured by the extent of the services performed by petitioner and the benefits derived therefrom by the creditors of the Intermountain Building & Loan Association and by the receiver of said association, and the receivership estate.

V.

The services rendered by petitioner to the petitioning creditors of Intermountain Building & Loan Association, and to the receiver, were not less extensive or less valuable than the services rendered by Elizabeth G. Monaghan to them. The United States Circuit Court of Appeals for the Ninth Circuit on January 21, 1944, (140 Fed. 2d, 31) in reviewing said order of the trial court entered on December 7, 1942 reversed said order and awarded [295] additional compensation to said Elizabeth G. Monaghan. Measured by that decision and judgment of the Circuit Court of Appeals, the trial court by said order of December 7, 1942 committed error in fixing the amount of the allowance and award of compensation to petitioner herein.

VI.

The verified petition filed by petitioner on March 31, 1944, for the first time requested compensation for services performed by him for the receiver of Intermountain Building & Loan Association. Said petition is supported by the oath of petitioner for the receiver of Intermountain Building & Loan Association, and fixes the reasonable value of such services. Neither said verified petition nor supporting affidavit is controverted by the receiver, and therefore the order of the trial court entered herein on November 29, 1944, denying the petition filed herein by petitioner on March 31, 1944, is wholly unconscionable and erroneous in that it deprives

petitioner of just compensation earned by him for services performed on behalf of the receiver of Intermountain Building & Loan Association.

VII.

The uncontroverted and uncontradicted record and proceedings herein disclose that petitioner's services were and are of the value of not less than $100,000.00 but, notwithstanding the record and proceedings in this respect, the trial court through error and an abuse of judicial discretion awarded to petitioner compensation for such services only in the sum of $5,000.00, in addition to the sum of $7,500.00 which had theretofore been received by petitioner.

VIII.

The allowance and award made by the trial court to the petitioner for services performed by him, as provided in the order entered December 7, 1942, was not, and could not have been, a [296] final order as said order purports to be, for the reason that said order was and is an administrative order in equity, subject to review and correction before the termination of the receivership proceedings.

IX.

The trial court entertained and considered the verified petition of the petitioner filed herein on March 31, 1944 to review and rehear said order entered on December 7, 1942, and after the entertainment and consideration of said petition, the trial court on November 29, 1944 denied said petition

and dismissed the same, and by thus entertaining and considering said petition filed by petitioner on March 31, 1944, and by denying said petition by the order entered by the trial court on November 29, 1944, both the order entered on December 7, 1942 and the order entered on November 29, 1944 then became subject to appeal and review within the time provided by law.

X.

The order entered on December 7, 1942, and the order entered on November 29, 1944, denying petitioner adequate compensation as set forth and requested by the petitions filed herein by petitioner on October 15, 1937 and March 31, 1944, constitute an abuse of sound judicial discretion and deprive petitioner of compensation to which he is rightfully entitled and unjustly enriches the receivership estate.

XI.

The trial court erred in refusing to allow and award to petitioner compensation requested in the petition filed on March 31, 1944 in addition to the compensation allowed and awarded by the trial court by the order entered December 7, 1942, for the reason that it was the duty of the trial court to entertain and consider said petition filed by petitioner on March 31, 1944 and to correct the errors of law and fact apparent in said order [297] entered on December 7, 1942, and to award petitioner compensation in such amount as appeared from the entire record and proceedings to be just and proper.

XII.

The acceptance by petitioner of the award made to him by the trial court by the order entered December 7, 1942 did not and could not bar or estop petitioner from claiming additional compensation for services performed to the creditors of Intermountain Building & Loan Association, and also to the receiver thereof, for the reason that petitioner by his petition filed October 15, 1937, as amended and supplemented, then requested a partial allowance for compensation for services performed to the petitioning creditors only and not for services performed to the receiver. The acceptance by petitioner of the amount of the award was an acceptance of an amount to which petitioner was entitled in all events and did not and could not bar or estop petitioner from thereafter claiming additional compensation in such amount as was just and proper which he reserved the right to claim, and for compensation for services performed for the receiver which he had not claimed at the time of the entry of the order of December 2, 1942.

XIII.

The trial court, by entertaining and considering the petition filed by petitioner on March 31, 1944, and denying and dismissing the same on November 29, 1944, again put in issue the petition filed by petitioner on October 15, 1937 and also the order of the trial court entered thereon on December 7, 1942, and reopened the order of December 7, 1942 for appeal and review.

XIV.

The order of the trial court entered on December 7, 1942, insofar as it purported to deny petitioner compensation for services performed by him for and on behalf of the receiver of Intermountain Building & Loan Association, deprived petitioner of [298] just compensation for such services without notice or hearing because petitioner did not claim compensation for such services until the filing of the petition on March 31, 1944, and by reason thereof the trial court was without jurisdiction or power to enter the order of December 7, 1942 which deprived petitioner of compensation for such services.

Dated at Phoenix, within the District of Arizona, this 7th day of December, 1944.

LESLIE C. HARDY
Attorney for Petitioner,
Thomas W. Nealon

Received a copy of the within document this 7th day of December, 1944.

(S) LOUIS B. WHITNEY
Attorney for Receiver

[Endorsed]: Filed Dec. 7, 1944. [299]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT UNDER RULE 73 (b)

Notice Is Hereby Given that Thomas W. Nealon, petitioner herein, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that certain order made and filed herein on December 7, 1942, entitled: "Final Order Fixing Attorney's Fees and Expenses, and Ordering Payment of Balance Due Thomas W. Nealon," and entered herein on the Clerk's Docket on December 7, 1942.

The said Thomas W. Nealon hereby also appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that certain order made and filed herein on November 29, 1944, entitled: "Final Order Denying Petition and Dismissing Same," and entered herein on the Clerk's Docket on November 29, 1944.

Dated at Phoenix, within the District of Arizona, this 7th day of December, 1944.

LESLIE C. HARDY
Attorney for Appellant,
Thomas W. Nealon

[Endorsed]: Filed Dec. 7, 1944. [300]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents: That Thomas W. Nealon, petitioner and appellant herein, as principal, and Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland and duly authorized to transact its corporate business within the State of Arizona, as surety, are firmly held and bound unto Intermountain Building & Loan Association, a corporation, defendant above named, and to Harry W. Hill, as Receiver of the said Intermountain Building & Loan Association, in the principal sum of Two Hundred Fifty and No/100 ($250.00) Dollars lawful money of the United States of America, to be paid to said Intermountain Building & Loan Association and to said Harry W. Hill, as Receiver thereof, its and his successors or assigns, for which payment well and truly to be made we bind ourselves, our successors and assigns firmly by these presents.

The condition of this obligation is such that:

Whereas, certain orders were made and entered herein on December 7, 1942 and November 29, 1944, respectively, in the above entitled cause of action, wherein and whereby the same were against the said Thomas W. Nealon, as such petitioner, the [301] principal herein, and in favor of the above named Intermountain Building & Loan Association, a corporation, and the said Harry W. Hill, as the Receiver therefor; and,

Whereas, the said petitioner, Thomas W. Nealon, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from said orders;

Now, Therefore, if the said Thomas W. Nealon shall prosecute his said appeal with effect and shall pay all costs which have accrued in the United States District Court for the District of Arizona and which may accrue in the United States Circuit Court of Appeals for the Ninth Circuit, then this obligation shall be void; otherwise it shall remain in full force and virtue.

In Witness Whereof the said Thomas W. Nealon, as principal, and said Fidelity and Deposit Company of Maryland, as surety, have executed these presents on this 7th day of December, 1944.

THOMAS W. NEALON
Principal

(Seal) FIDELITY AND DEPOSIT COMPANY OF MARYLAND

By F. E. SCRIVNER
Attorney-in-Fact, Surety

Received a copy of the within document this 7th day of December, 1944.

LOUIS B. WHITNEY (D.S.)
Attorney for Receiver

[Endorsed]: Filed Dec. 7, 1944. [302]

GUADALUPE R. GALLEGOS, and FRANCESCA GALLEGOS, his wife; INGA G. GUDMUNDSEN; and MATA E. DEXTER in their own behalf and in behalf of others similarly situated,

Plaintiffs,

vs.

INTERMOUNTAIN BUILDING AND LOAN ASSOCIATION, a Corporation,

Defendant.

EDWARD O'REILLY, KITTY R. CROSSMAN and FRANK W. NELSON,

Intervenors,

H. C. SMOOT and SOPHIA SMOOT,

Intervenors,

N. S. HERRING,

Intervenors.

Date	Document Number	Filings—Proceeding
Dec. 7, 1942	1908	Enter and file Final Order Fixing Attorneys' Fees and Expenses, and Ordering Payment of Balance Due Thomas W. Nealon. Mail copy of order No. 1908 to Thomas W. Nealon.
		* * *
Nov. 29, 1944		Whitney pres. Hardy pres. Leslie Hardy, Esq., appears on behalf of Petitioner Thomas W. Nealon, and states that Petitioner Nealon desires the records to show that said Petitioner declines to amend or plead further.

Nov. 29, 1944 2071 Enter and file Order denying Petition of Thomas W. Nealon filed March 31, 1944 and dismissing same with prejudice.

[303]

In the District Court of the United States
In and for the District of Arizona

No. E-268 Phoenix

GUADALUPE R. GALLEGOS and FRANCESCA GALLEGOS, his wife, INGA G. GUDMUNDSEN, and MATA E. DEXTER, in their own behalf and in behalf of others similarly situated,

Plaintiffs,

vs.

INTERMOUNTAIN BUILDING & LOAN ASSOCIATION, a corporation,

Defendant.

MOTION TO SEND TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT IN AID OF THE APPEAL OF THOMAS W. NEALON HEREIN, THE ORIGINAL TRANSCRIPT OF RECORD INSTEAD OF A CERTIFIED COPY THEREOF FILED HEREIN ON NOVEMBER 24, 1944 AND DESIGNATED AS PETITIONER NEALON'S EXHIBIT No. 1; AND ORDER THEREON.

The petitioner, Thomas W. Nealon, respectfully requests this Court to make and enter an order

herein authorizing and directing the Clerk of this Court to transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, in aid of the appeal of petitioner, Thomas W. Nealon, the original printed transcript of record filed in the United States Circuit Court of Appeals for the Ninth Circuit in the case of Monaghan, Appellant, vs. Hill, Appellee, No. 10408, and filed herein on November 24, 1944 as petitioner Nealon's Exhibit No. 1, instead of a certified copy of said printed record.

Dated this 6th day of December at Phoenix, Arizona.

LESLIE C. HARDY
Attorney for Petitioner,
Thomas W. Nealon

ORDER

Upon reading the foregoing petition,

It Is Ordered that the Clerk of this Court transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, in aid of the appeal of Thomas W. Nealon herein, the original printed transcript of record filed in the United States Circuit Court of Appeals for the Ninth Circuit in the case of Monaghan, Appellant, vs. Hill, Appellee, No. 10408, and filed herein on November 24, 1944 and designated as petitioner Nealon's Exhibit No. 1, instead of a certified copy of said exhibit, and to be returned to the Clerk of this Court after it is no longer required by said Circuit Court of Appeals.

Dated this 6 day of December at Phoenix, Arizona.

DAVE W. LING
United States District Judge
[304]

Received a copy of the within document this 5th day of December, 1944.

LOUIS B. WHITNEY (D.S.)
Attorney for Receiver

[Endorsed]: Filed Dec. 6, 1944. [305]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL PURSUANT TO RULE 75 (a) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Thomas W. Nealon, the petitioner herein, designates the following portions of the record and proceedings to be contained in the record on his appeal herein.

1. Petitioner Nealon's Exhibit No. 1, being copy of printed transcript of record in U. S. Circuit Court of Appeals for the Ninth Circuit in Elizabeth G. Monaghan, Appellant, vs. Harry W. Hill, as Receiver of the Intermountain Building and Loan Association, a corporation, Appellee, No. 10408, filed in this Court November 24, 1944.

2. Minute entry of order of November 24, 1944 granting motion of attorney for petitioner, Thomas

W. Nealon, that a copy of the printed transcript of record in U. S. Circuit Court of Appeals for the Ninth Circuit in the case of Monaghan v. Hill, Receiver, No. 10408, in the Circuit Court of Appeals, be admitted in evidence in support of Nealon's petition, filed March 21, 1944.

3. Motion to send to United States Circuit Court of Appeals for the Ninth Circuit in aid of the appeal of Thomas W. Nealon herein, the original transcript of record instead of a certified copy thereof filed herein on November 24, 1944 [306] and designated as petitioner Nealon's Exhibit No. 1; and order thereon, filed December 7, 1944.

4. Application of receiver for appointment of attorneys and order appointing attorneys, filed December 2, 1935.

5. Receiver's petition praying for instructions concerning trip to Utah and other states in reference to affairs of Intermountain Building and Loan Association and authorizing expenses therefor, filed December 2, 1935.

6. Order authorizing receiver and his counsel to make trip to Utah and other states and allowing expenses therefor, filed December 2, 1935.

7. Order for monthly allowance to Henry S. McCluskey as Receiver and directing the payment thereof, filed January 28, 1936.

8. Order for monthly allowance of attorney's fees to Elizabeth G. Monaghan, filed January 28, 1936.

9. Order for monthly allowance of attorney's fees to Thomas W. Nealon, filed January 28, 1936.

10. Petition of co-receivers for authority to institute suit in Idaho, filed March 27, 1936.

11. Order authorizing and directing Henry S. McCluskey and George A. Mauk, as co-receivers of Intermountain Building and Loan Association, to join with other plaintiffs in a suit in Idaho and to employ Idaho counsel, filed March 27, 1936.

12. Petition for allowance and payment of $12,-500.00 upon account of fees to Thomas W. Nealon, filed December 20, 1937.

13. Final report and account of Henry S. McCluskey, as receiver of Intermountain Building and Loan Association, an Utah corporation; and petitions praying for the approval thereof, for the determination and allowance of compensation to [307] petitioner, for final discharge and exoneration of bond, and for the court to set a date for hearing thereof and to determine the form of notice to be given and order thereon, filed September 3, 1937.

14. Order approving final acount of Henry S. McCluskey, Receiver of Intermountain Building and Loan Asociation; granting his petition for discharge and exempting his bond; and order extending time for fixing and allowing compensation, filed October 12, 1937.

15. Petition of Thomas W. Nealon requesting this Honorable Court to review and rehear final order fixing attorney's fees and expenses of Thomas W. Nealon, made and entered herein on December 7, 1942, filed March 31, 1944.

16. Affidavit of Thomas W. Nealon, filed March 31, 1944.

17. Acknowledgment of service of Nealon's petition, filed March 31, 1944.

18. Answer of Harry W. Hill, Receiver, filed May 8, 1944.

19. Order following pre-trial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure, filed June 7, 1944.

20. Motion to submit petition of Thomas W. Nealon, filed November 21, 1944.

21. Stipulation to submit petition on briefs without oral argument, filed November 22. 1944.

22. Motion of Harry W. Hill, receiver, for order denying petition and dismissing same, filed November 22, 1944.

23. Final order denying petition and dismissing same, filed November 29, 1944.

24. Statement of points on which petitioner Thomas W. Nealon, intends to rely on his appeal, filed December 7, 1944. [308]

25. Notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit under Rule 73 (b), filed December 7, 1944.

26. Bond on appeal, filed December 7, 1944.

27. Minute entry of order of November 22, 1944 granting receiver's motion for order denying petition of Thomas W. Nealon and dismissing the same.

28. Clerk's two (2) docket entries of November 29, 1944.

29. Clerk's docket entry of December 7, 1942 entering final order fixing attorney's fees and expenses and ordering payment of balance due Thomas W. Nealon.

30. This designation, filed December 7, 1944.

Dated at Phoenix, within the District of Arizona, this 7th day of December, 1944.

LESLIE C. HARDY
Attorney for Petitioner,
Thomas W. Nealon

Received a copy of the within document this 7th day of December, 1944.

LOUIS B. WHITNEY (D.S.)
Attorney for Receiver

[Endorsed]: Filed Dec. 7, 1944. [309]

[Title of District Court and Cause.]

DESIGNATION BY APPELLEE OF ADDITIONAL PORTIONS OR RECORD, PROCEEDINGS, AND EVIDENCE TO BE TRANSMITTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO BE CONTAINED IN THE RECORD ON APPEAL

To: The Clerk of the United States District Court for the District of Arizona:

You are hereby requested, pursuant to the provisions of Federal Rule 75(a) of Federal Rules for Civil Procedure to incorporate into the Transcript of Record on Appeal herein, in addition to the portions of the record indicated by Appellant herein, the following:

1. Petition of Thomas W. Nealon for Allowance of Attorneys fees for Legal Services Rendered and Expenses Incurred in the Preparation and Trial of the Above Entitled Suit. Filed October 15, 1937. (Document No. 893).

2. Order to Show Cause. Filed October 15, 1937. (Document No. 894).

3. Affidavit Re Order to Show Cause. Filed December 20, 1937. (Document No. 971).

4. All Minute Entries of December 20, 1937, pertaining to the captioned cause.

5. Petition for Out of Pocket Expenses. Filed by Thomas W. Nealon, December 20, 1937. (Document No. 974).

6. Order Allowing Thomas W. Nealon $5,000.00. Filed February 10, 1938. (Document No. 1037).

[310]

7. Minute Entries of February 10, 1938, pertaining to above order.

8. Order Allowing Thomas W. Nealon $2,500.00. Filed March 3, 1939. (Document No. 1351).

9. Minute Entries of March 3, 1939, pertaining to above order.

10. Final Order Fixing Attorneys Fees and Expenses and Ordering Payment of Balance to Thomas W. Nealon. Filed December 7, 1942. (Document No. 1908).

11. Minute and Docket Entries of December 7, 1942, relating to above order.

12. Docket Entry showing mailing notice and/or copy of Final Order of December 7, 1942, to Thomas W. Nealon.

13. Order submitting motions for decision. Filed November 22, 1944.

14. Minute Entries of November 29, 1944, showing that Petitioner Thomas W. Nealon declines to amend, and all other Minute Entries of November 29, 1944, pertaining to this cause.

15. Order Appointing John L. Gust as one of Attorneys for Receiver. Filed January 28, 1936. (Document No. 119).

16. Petition of Receiver for Allowance to John L. Gust as one of Attorneys for Receiver. Filed January 28, 1936. (Document No. 120).

17. Order for Allowance to John L. Gust. Filed January 28, 1936. (Document No. 121).

18. This Additional Designation.

Dated at Phoenix, Arizona, this 13th day of December, 1944.

LOUIS B. WHITNEY
Attorney for Appellee

Due Service of the within, by copy, acknowledged this 13th day of December, 1944.

LESLIE C. HARDY
Attorney for Appellant [311]

[Endorsed]: Filed Dec. 13, 1944. [312]

[Title of District Court and Cause.]

STIPULATION TO AMEND DESIGNATION BY APPELLEE OF ADDITIONAL PORTIONS OF RECORD, PROCEEDINGS AND EVIDENCE TO BE TRANSMITTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO BE CONTAINED IN THE RECORD ON APPEAL, FILED HEREIN ON DECEMBER 14th, 1944

To the Clerk of the United States District Court for the District of Arizona:

It Is Hereby Agreed, by and between Leslie C. Hardy, attorney for Thomas W. Nealon, petitioner and appellant herein, and Louis B. Whitney, attorney for Harry W. Hill, Receiver and Appellee herein, that item 6 of the Designation by Appellee of the Additional Portions of Record, Proceedings and Evidence to be Transmitted to the United States Circuit Court of Appeals for the Ninth Circuit to be Contained in the Record on Appeal, be amended as follows: "6. Order Allowing Thomas W. Nealon $5,000.00 Filed February 18, 1938. (Document No. 1037)."

Dated at Phoenix, Arizona, this 20th day of December, 1944.

LESLIE C. HARDY
Attorney for Appellant
LOUIS B. WHITNEY
Attorney for Appellee [313]

Received a copy of the within mentioned document this 20th day of December, 1944.

LOUIS B. WHITNEY
Attorney for Appellee

[Endorsed]: Filed Dec. 20, 1944. [314]

In the United States District Court for the District of Arizona

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD

United States of America,
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Guadalupe R. Gallegos, et al, Plaintiff, versus Intermountain Building and Loan Association, a corporation, Defendant, Case No. E-268-Phoenix, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 314, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon as the same appear from the originals of record and on file in my custody as such Clerk, in the City of Phoenix, State and District aforesaid, as called for and designated in the Designation of Contents of Record on Ap-

peal and Additional Designation filed in said case and made a part of the transcript attached hereto.

I further certify that original Petitioner Nealon's Exhibit No. 1, copy of printed transcript of record in U. S. Circuit Court of Appeals for the Ninth Circuit in Elizabeth G. Monaghan, Appellant, vs. Harry W. Hill, as Receiver of the Intermountain Building and Loan Association, a corporation, Appellee, No. 10408, filed in said cause November 24, 1944, is transmitted with the transcript of record pursuant to order therefor entered November 24, 1944.

I further certify that the Clerk's fees for preparing and certifying to this said transcript of record amounts to the sum of $51.25 and that said sum has been paid to me by counsel for the Appellant.

Witness my hand and the Seal of said Court this 30 day of December, 1944.

(Seal) EDWARD W. SCRUGGS,
Clerk [315]

[Endorsed]: No. 10961. United States Circuit Court of Appeals for the Ninth Circuit. Thomas W. Nealon, Appellant, vs. Harry W. Hill, as Receiver of Intermountain Building & Loan Association, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed January 8, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10961

THOMAS W. NEALON,

Appellant,

vs.

HARRY W. HILL, as Receiver of Intermountain Building & Loan Association, a corporation,

Appellee.

ADOPTION OF STATEMENT OF POINTS FILED IN THE TRIAL COURT AS REQUIRED BY SUB. 6, RULE 19

Thomas W. Nealon, appellant herein, who appeals to this Court from that certain order made and entered in the District Court of the United States for the District of Arizona in the suit of

Guadalupe R. Gallegos, et al, plaintiffs, vs. Intermountain Building & Loan Association, a corporation, defendant, No. E-268 Phoenix, entitled: "Final Order Fixing Attorney's Fees and Expenses and Ordering Payment of Balance Due Thomas W. Nealon," and entered in said Court on the Clerk's docket on December 7, 1942, and also from that certain order made and filed therein on November 29, 1944, entitled: "Final Order Denying Petition and Dismissing Same," and entered therein on the Clerk's docket on November 29, 1944, adopts as Appellant's Statement of Points on this appeal the Statement of Points filed in the District Court of the United States for the District of Arizona, which appears at pages 294 to 299, both inclusive, of the Transcript of Record prepared and transmitted to this Court by the Clerk of said United States District Court.

Dated this 6th day of January, 1945.

LESLIE C. HARDY,
Attorney for Appellant.

Service of the foregoing is acknowledged this 6th day of January, 1945.

LOUIS B. WHITNEY,
Attorney for Appellee.

[Endorsed]: Filed Jan. 9, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION DESIGNATING PARTS OF RECORD TO BE PRINTED ON APPEAL OF APPELLANT, THOMAS W. NEALON

It Is Stipulated, by and between Thomas W. Nealon, Appellant herein, by his attorney, Leslie C. Hardy, Esq., and Harry W. Hill, as Receiver of Intermountain Building & Loan Association, a corporation, Appellee herein, by his attorney, Louis B. Whitney, Esq., that the following shall be included and printed in the Transcript of Record on the appeal of Thomas W. Nealon, viz:

(1) The whole of the Transcript of Record transmitted by the Clerk of the District Court of the United States for the District of Arizona to the Clerk of this Court in aid of said appeal, save and except there shall not be printed the following:

(a) Petition of Thomas W. Nealon for Allowance of Attorney's Fees for Legal Services Rendered and Expenses Incurred in the Preparation of the Trial, etc., filed in said District Court on October 15, 1937, which appears at pages 182 to 225, both inclusive, of the Transcript of Record herein prepared and transmitted to this Court by the Clerk of said United States District Court.

(b) Final Order Fixing Attorney's Fees and Expenses and Ordering Payment of Balance Due to Thomas W. Nealon, filed in said United States District Court on December 7, 1942, which appears at pages 238 to 239, both inclusive, of the Transcript of Record herein prepared and transmitted to this

Court by the Clerk of said United States District Court.

(2) It is further stipulated and agreed that the petition and order specified in the foregoing subparagraphs (a) and (b) are included and printed in the Transcript of Record on the appeal, entitled "Elizabeth G. Monaghan, Appellant, vs. Harry W. Hill, as Receiver of Intermountain Building & Loan Association, a corporation, Appellee," No. 10408, heretofore filed in the United States Circuit Court of Appeals for the Ninth Circuit, and that the Transcript of Record on said appeal, insofar as the same may be applicable, is hereby adopted as a part of the Transcript of Record on this appeal of the said Thomas W. Nealon, but omitting the Statement of Points and Stipulation beginning on pages 374 to 386, both inclusive, of said Transcript of Record, and it is agreed that said Transcript of Record is a true and correct transcription of the proceedings taken and had in said United States District Court in said case of Monahgan v. Hill.

(3) It is further stipulated and agreed that the Transcript of Record on said appeal in Monaghan v. Hill, No. 10408, supra, with said omissions, may be utilized and bound in by the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit as a part of the printed Transcript of Record in this appeal of the said Thomas W. Nealon.

(4) It is further stipulated and agreed that a correct printed copy of the Transcript of Record on said appeal in Monaghan v. Hill, No. 10408,

supra, was filed in said United States District Court on November 24, 1944 as Appellant, Thomas W. Nealon's Exhibit No. 1, and that said exhibit is referred to in subdivisions 1, 2 and 3 of the Designation of Contents of Record on this appeal filed in the said United States District Court on the 7th day of December, 1944, and which Designation appears at pages 306 to 309, both inclusive, of the Transcript of Record herein prepared and transmitted to this Court by the Clerk of said United States District Court, and that said exhibit constitutes a part of the Transcript of Record herein as transmitted to this Court by the Clerk of said United States District Court.

(5) It is further stipulated and agreed that this stipulation is entered into for the purpose of saving printing costs and that Appellee does not waive his right to question the consideration of said Exhibit No. 1 by the above entitled Court for any legal reason as may appear.

Dated this 6th day of January, 1945.

LESLIE C. HARDY,
Attorney for Appellant,
Thomas W. Nealon

LOUIS B. WHITNEY
Attorney for Appellee, Harry W. Hill, as Receiver, etc.

[Endorsed]: Filed Jan. 9, 1944. Paul P. O'Brien, Clerk.

No. 10961

United States
Circuit Court of Appeals
For the Ninth Circuit

THOMAS W. NEALON,

Appellant,

v.

HARRY W. HILL, as Receiver of Intermountain Building & Loan Association, a corporation,

Appellee.

Brief of Appellant

Upon Appeal From the District Court of the United States for the District of Arizona

LESLIE C. HARDY,
Attorney for Appellant

THOMAS W. NEALON,
In Propria Persona

REPUBLIC AND GAZETTE PRINTERY, PHOENIX

FILED
MAR 30 1945
PAUL P. O'BRIEN,
CLERK

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No. 10961

United States
Circuit Court of Appeals
For the Ninth Circuit

THOMAS W. NEALON,

Appellant,

vs.

HARRY W. HILL, as Receiver of Intermountain Building & Loan Association, a corporation,

Appellee.

Brief of Appellant

PRELIMINARY STATEMENT

This is an appeal by Thomas W. Nealon from an order of the United States District Court for the District of Arizona, sitting at Phoenix, made and entered on December 7, 1942 (R. 243) awarding petitioner compensation for services performed by appellant as an attorney for creditors of Intermountain Building & Loan Association, an Utah corporation, wherein creditors of that association, individually, and as a class, instituted a suit in the United States District Court for the District of Arizona for the appointment of a receiver of the assets of that association; and from an order of the District Court entered on November 29, 1944 (R.

657) which denied and dismissed appellant's petition filed March 31, 1944 (R. 599) to rehear and review the order of December 7, 1942, and for compensation for services rendered by appellant as attorney for the receiver, and in the ancillary receiverships.

STATEMENT AS TO JURISDICTION

Jurisdiction of District Court

A class suit, wherein certificate holding creditors of Intermountain Building & Loan Association petitioned for a receiver of the association, was filed in the United States District Court for the District of Arizona, entitled:

> "Guadalupe R. Gallegos and Francesca Gallegos, his wife, Inga G. Gudmundsen and Mata E. Dexter, in their own behalf and in behalf of others similarly situated, Plaintiffs, vs. Intermonutain Building & Loan Association, a corporation, Defendant," No. E-268 Phoenix (R. 2-34).

In that suit the petitioning creditors, as plaintiffs, alleged that jurisdiction was conferred upon the District Court by reason of diversity of citizenship of the parties thereto, plaintiffs being residents of Arizona, and the defendant association being a corporation organized under the laws of Utah, and doing business in Arizona, and in which it was alleged that the amount in controversy exceeded $3,000.00 (R. 2-3).

From two interlocutory orders entered in the suit, one appointing a receiver pendente lite, and the other enjoining the association from removing assets

from Arizona, the association appealed to this Court, which affirmed.[1]

Jurisdiction of the suit by the District Court was conferred by Sec. 24, Judicial Code, as amended. (Title 28, Sec. 41, USCA). That section, as it applied to the suit, is as follows:

> "First: Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States * * *, or (c) is between citizens of a State and foreign States, citizens, or subjects * * *."

Appellant filed a petition on October 15, 1937 in the suit requesting attorney's fees for services rendered on behalf of the petitioning creditors. (R. 108-164). The petition was heard on December 20, 1937. (R. 245). On December 7, 1942—five years after the petition was heard—the trial court entered an order which purported to be a final order awarding appellant total fees for services rendered to the petitioning creditors, and also to the receiver. (R. 243-248). On March 31, 1944 appellant filed a petition to rehear and review the order of December 7, 1942. (R. 599). The trial judge entertained and considered appellant's petition of March 31, 1944 to rehear and review the order of December 7, 1942 and entered an order on November 29, 1944 granting appellee's motion to dismiss the petition, and denied and dismissed the petition with prejudice. (R. 657).

[1] *Intermountain Building & Loan Association, et al, v. Gallegos, et al,* 9 Cir., 78 Fed. 2d 972; cert. den. 296 U.S. 639, 80 L. Ed. 454, 56 S. Ct. 172.

The District Court had jurisdiction to entertain appellant's petition filed October 15, 1937 in the class suit for attorney's fees payable out of funds recovered for the members of the class who accepted the benefits derived for them by appellant.

> *Monaghan* v. *Hill, as receiver,* 9 Cir., 140 Fed. 31.

The District Court had jurisdiction to entertain appellant's petition filed march 31, 1944 in the class suit which requested, for the first time, an allowance for compensation for services performed by appellant as attorney for the receiver.

> *Drilling & Exploration Corporation* v. *Webster,* 9 Cir., 69 Fed. (2d) 416.

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked under Sec. 128 (a) of the Judicial Code, as amended (Title 28, Sec. 225 USCA) which provides:

> (a) *Review of Final Decisions.* The Circuit Courts of Appeal shall have appellate jurisdiction to review by appeal the final decisions—
>
> First. In the district courts, in all cases save where direct review of the decision may be had in the Supreme Court under section 345 of this title.

Sec. 240-8 (c) of the Judicial Code (Title 28, Sec. 230 USCA) provides:

> "No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

Appellee, as receiver, on May 8, 1944 filed an answer to appellant's petition filed March 31, 1944 to review and rehear the order entered December 7, 1942. (R. 632). The Court ordered a pre-trial conference under Rule 16 of the Federal Rules of Civil Procedure and, following that order, counsel for the petitioner (appellant) and receiver (appellee) together formulated the issues which were approved and adopted by the trial court on June 7, 1944. (R. 643-651).

A motion to submit the petition was filed November 21, 1944. (R. 651). Respective counsel on November 22, 1944 stipulated to submit the petition for decision on briefs theretofore filed by them (R. 653), and it was so ordered by the trial court. (R. 653).

Appellee on November 22, 1944 moved for an order denying and dismissing the petition filed by appellant on March 31, 1944 to rehear and review the order entered December 7, 1942. (R. 653). The trial court entered a final order on November 29, 1944, granting appellee's motion to deny and dismiss the petition, and dismissed the petition with prejudice. (R. 657).

The trial court by entertaining, considering and disposing of the petition filed by appellant on March 31, 1944 to review and rehear the order of December 7, 1942, as above recited, enlarged the time for appealing from the order of December 7, 1942.

Bowman v. *Lopereno,* 311 U. S. 262, 85 L. Ed. 177, 61 S. Ct. 201.

Wayne United Gas Co. v. *Owens-Illinois Glass Co.,* 300 U. S. 131, 81 L. Ed. 557, 57 S. Ct. 382.

Pfister v. *Northern Illinois Co.* 317 U. S. 144, 87 L. Ed. 146, 63 S. Ct. 133.

The order entered December 7, 1942 awarding compensation to appellant was entered on the Clerk's docket the same day. (R. 669). The order entered November 29, 1944, denying a review and rehearing of the order entered December 7, 1942, was entered on the Clerk's docket November 29, 1944. (R. 670). The orders are now final as of the date of their entry. Notice of appeal from both orders was filed December 7, 1944. (R. 666).[2] The bond on appeal was filed on the same day the notice of appeal was filed. (R. 667).

RECORD ON APPEAL

Upon motion of appellant, the printed transcript of record filed in this Court in the cause of Elizabeth G. Monaghan vs. Harry W. Hill, as receiver, No. 10408, was ordered filed as an exhibit in the lower court in support of appellant's petition filed March 31, 1944. (R. 656). Upon motion of appellant, the trial court ordered said printed transcript of record to be transmitted to this Court instead of a certified copy thereof. (R. 670-672). Respective counsel stipulated that said printed transcript of record could be utilized on this appeal and bound in as part of the transcript of record on this appeal. (R. 684-686).

Appellant filed a designation of contents of record on appeal pursuant to Rule 75 (a) of the Rules of Civil Procedure. (R. 672-676). Appellee filed a designation of additional contents of record on appeal. (R. 676-678).

[2]No opinion in support of either order was delivered by the trial judge.

STATEMENT OF THE CASE

This appeal of Thomas W. Nealon had its genesis in Intermountain Building & Loan Association, and the fraudulent conduct of the officers of that association in dissipating its assets.*

The appellant rendered extensive and valuable rsevices as one of the attorneys for the creditors of the Intermountain Building & Loan Association in a creditors' class suit which eventuated in the appointment of a receiver for that association by the United States District Court for the District of Arizona. Appellant also rendered extensive and valuable services as the attorney for Henry S. McCluskey, the first receiver of the association, and also in the ancillary receiverships.

An extensive narrative of the facts underlying the extent and value of the professional services appellant rendered to these creditors, going back as they do many months prior to April, 1933 (R. 110), seems unnecessary, because this Court has reviewed those facts upon the several related appeals which reached this Court. Those appeals reveal the persistent and successful efforts of appellant to marshall the as-

*The background of Intermountain has been reviewed by this Court on several occasions in:

Intermountain Building & Loan Association, et al v. Gallegos, et al, 9 Cir., 78 Fed. 2d 972; cert. den. 296 U.S. 639, 80 L. Ed. 454, 56 S. Ct. 172.

Guadalupe R. Gallegos, et al v. Lloyd R. Smith, Corporation Commissioner, 9 Cir., 111 Fed. 2d 805; cert. den. 311 U.S. 668, 85 L. Ed. 429, 61 S. Ct. 27.

Julius G. Brashear v. Intermountain Building & Loan Association, et al, 9 Cir., 109 Fed. 2d 857; cert. den. 311 U.S. 655, 85 L. Ed. 419, 61 S. Ct. 9.

Monaghan v. Hill, as Receiver, 9 Cir., 140 Fed. 2d 31.

sets of Intermountain into a receivership for the benefit of its numerous creditors, and to preserve those assets from dissipation by the fraudulent practices of its officers and their consorts.

It is sufficient to say that Nealon, with his co-solicitor, Elizabeth G. Monaghan, as the solicitors for the petitioning creditors, relentlessly pursued the officers of the Intermountain until finally, with the approval of this Court, and the Supreme Court, the total remaining assets of Intermountain finally were husbanded in the custody of a receiver.

Intermountain is an Utah corporation. During 1933 one Malia was the Bank Commissioner of that state. None opposed the receivership more vigorously than Malia (R. 133 to 139) although characterized by this Court as a public official who "had shown himself not to be a proper person to husband the dwindling assets of the failing association." (78 Fed. 2d 972, 983).

Nonetheless Nealon, and his co-counsel, saved and preserved for the creditors of Intermountain gross assets valued at more than $2,000,000, and through these efforts almost 3,000 creditors elected to avail themselves of the suit. (140 Fed. 2d 31, 33).

Henry S. McCluskey was appointed permanent receiver of Intermountain on the 8th day of February, 1936. (R. 400). He continued as such until April 1, 1937 when he was succeeded by Harry W. Hill, the present receiver and appellee herein. McCluskey rendered a final and complete accounting of his receivership (R. 396) and was discharged. (R. 579). While McCluskey acted as receiver, appellant was his counsel under appointment of the district court. (R. 378). During that time appellant pre-

pared and presented 549 petitions, applications and orders pertaining to the receivership affairs, many of which required extensive study of questions of related law. (R. 471, 605).

On October 15, 1937 appellant filed his petition in the district court for an allowance of attorney's fees for services rendered and expenses incurred in the preparation and trial of the creditors' suit. (R. 108). He then claimed, as the petition discloses, no compensation for the extensive services rendered to the receiver, or in connection with the ancillary receiverships. At the time appellant's petition came on for hearing, he filed a written amendment or supplement to it requesting an allowance on account of partial attorney's fees in the amount of $12,500, (R. 594) and orally explained his reason for so doing. (R. 371). The trial court by the order entered December 7, 1942 awarded appellant $12,500, less $7,-500, which had been previously paid to him, plus out-of-pocket expenses. By that order the trial court purported to make a final award to appellant for all services he had performed, not only to the petitioning creditors but also to the receiver. (R. 243-248). The amount of this award was made by the trial court notwithstanding several experienced and reliable attorneys testified, without contradiction, that Nealon's services in the class suit alone were worth not less than $100,000. (R. 165, 217, 292, 316, 321). *Monaghan* v. *Hill,* 9 Cir., 140 Fed. (2d) 31.

Appellant's petition for fees for services rendered to the creditors in the suit fully and clearly portrays the extent of the services performed by him in the preparation of the suit and the conduct of it through a hazardous and difficult course over a period of three and one-half years down to the appointment of McCluskey as the permanent receiver. (R. 108).

The final report of McCluskey, as receiver, likewise fully and clearly discloses not only the extensive and valuable services performed by him as receiver, but also the no less extensive and valuable services performed by appellant as his attorney, and also in the ancillary receiverships. (R. 396).

Appellant's petition (R. 108), in addition, is a factual resume of the background of Intermountain before and during the time of the litigation leading to the receivership, and consequently a restatement of the facts as there narrated is unnecessary. The facts pertinent now were reviewed and stated by this Court in *Monaghan* v. *Hill,* 9 Cir., 140 Fed. (2d) 31, heretofore cited.

Appellant on March 31, 1944 filed a petition to review and rehear the order entered December 7, 1942. (R. 599). By that petition appellant again enumerated the services performed on behalf of the creditors in the suit requesting the appointment of a receiver for Intermountain, and, for the first time, claimed compensation for services rendered to the receiver, and for services performed in connection with the ancillary receiverships.

The petition filed March 31, 1944, was supported by the affidavit of appellant. (R. 620). The affidavit was not controverted, save as the petition which the affidavit supported was controverted. It sets forth in careful detail the services performed in the ancillary receivership, and also the services rendered to the receiver in the primary receivership. Appellant estimated the reasonable value of those services in the amount of $40,500. (R. 631).

Appellee, as receiver, on May 8, 1944 answered the appellant's petition filed March 31, 1944. (R. 632).

This answer objected to the jurisdiction of the court to entertain the petition; asserted that it failed to state a claim upon which relief can be granted; pleaded that the order entered December 7, 1942 was a final appealable order; and that no appeal was taken therefrom within time, or at all. The answer further pleaded payment by the receiver of the amount of the compensation awarded to appellant by the order entered December 7, 1942; sets forth the receiver's check *ipsissimis verbis;* pleads acceptance of the check and receipt of the proceeds by appellant.

An order following the pre-trial conference was entered June 7, 1944. (R. 643). This order left as the principal disputes at issue the value of the services performed by appellant; the right to claim compensation for services, in addition to the compensation awarded by the order entered December 7, 1942; the question of the finality of that order; and payment.

The trial court considered the petition filed March 31, 1944, and the related proceedings, and by an order entered November 29, 1944, denied appellant further relief (R. 657) from which appellant also appeals. (R. 666).

QUESTIONS INVOLVED

The questions involved are:

(a) The error of the trial court in entering the order of December 7, 1942 which awarded to appellant $12,500, less $7,500 which had already been paid to appellant, as and for a total and final award for all services rendered by appellant not only to the creditors of Intermountain, but also for services

rendered to the receiver, and in the ancillary receivership.

(b) The error of the trial court in denying and depriving appellant of just and adequate compensation for services rendered by him to the creditors in the class suit, and to the receiver, which the record herein, and the decision and judgment of this Court in *Monaghan* v. *Hill,* supra, disclose constituted an abuse of sound judicial discretion.

(c) The error of the trial court in entering the order of December 7, 1942, which purported to compensate appellant for services rendered by him to the receiver, and in the ancillary receivership matters, when in fact no issue had been framed which justified or authorized an award for those services.

(d) The error of the trial court in denying and dismissing appellant's petition filed on March 31, 1944 to review and rehear the order entered by the trial court on December 7, 1942.

HOW QUESTIONS ARE RAISED

The questions on this appeal are raised by the petitions filed by appellant in the class suit on October 15, 1937 and March 31, 1944 in the lower court for an allowance of compensation for services rendered by him, as heretofore recited, and the appeal from the orders of December 7, 1942 and November 29, 1944 entered on those petitions.

STATEMENT OF POINTS

Appellant filed a Statement of Points in the lower court as required by Rule 75 (d) of the Rules of Civil Procedure. (R. 659). The Statement of Points is adopted by appellant in this Court in aid of this appeal. (R. 682).

THE ORDER ENTERED DECEMBER 7, 1942 IS NOW REVIEWABLE ON THIS APPEAL.[4]

The order entered by the trial court on December 7, 1942, which purported to award to appellant total and final compensation for all services was not appealed from until December 7, 1944. (R. 666). Measured by Sec. 128 (a) of the Judicial Code, as amended, (Title 28, Sec. 225 USCA) the appeal is out of time. However, on March 31, 1944 appellant filed a petition to review and rehear the order entered December 7, 1942. (R. 599). The trial court entertained, considered and disposed of the petition as appears from the following proceedings had on it:

(a) The appellee, as receiver, on May 8, 1944 filed an answer to appellant's petition filed March 31, 1944. (R. 632).

(b) The trial court, after the petition and answer were filed, ordered a pre-trial conference, and by an order entered June 7, 1944, adopted the issues formulated by respective counsel, thus entertaining the petition and answer and also the issues as formulated. (R. 643).

(c) Appellant on November 21, 1944 moved to submit for decision the petition filed by appellant March 31, 1944. (R. 651).

(d) Counsel on November 22, 1944 stipulated to submit the petition for consideration and decision by the trial court on briefs which had been theretofore filed (R. 652), and the trial court so ordered. (R. 653).

(e) Appellee on November 22, 1944 filed a motion for an order to deny and dismiss the petition. (R. 653).

[4]This question is discussed less extensively beginning at page 4, supra.

(f) After considering the foregoing proceedings, and the issues raised by them, the trial court on November 29, 1944 entered a final order denying the petition and dismissing it with prejudice. (R. 657).

The foregoing proceedings in the lower court which eventuated in the order entered November 29, 1944 (R. 657) enlarged the time for appeal to this Court from the order entered December 7, 1942. Thus, the award of compensation made to appellant by the order of December 7, 1942 is open for review by this Court.

Bowman v. *Loperno,* 311 U. S. 262, 85 L. Ed. 177, 61 S. Ct. 201, we submit, authorizes the appeal.

In that case the judgment of this Court (110 Fed. 2d 348) was reversed by the Supreme Court. Bowman in 1935 sought an extension under Section 74 of the Bankruptcy Act. In 1936 the District Court, on petition for review, recommended that the proposal for an extension be not confirmed and that the debtor be adjudged a bankrupt. Successive petitions for review and rehearing were filed by Bowman and in ~~1939~~ the District Court, out of time, denied a petition for review filed in 1937. This Court refused to entertain the appeal from the order of the District Court as being out of time. 110 Fed. (2d) 348. The Supreme Court (311 U. S. 266) reversed and said:

> "The circumstances enlarged the time for taking appeal from the order of adjudication. The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time

for appeal. But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof.

"We hold that the court below should have entertained the appeal.

"The judgment is reversed and the cause is remanded to the Circuit Court of Appeals for further proceedings in conformity to this opinion."

Subsequently the mandate of the Supreme Court came down, and, upon reconsideration of the appeal from the district court, this Court reversed the district court.

In Re Bowman, 9 Cir., 118 Fed. (2d) 742.

This appeal presents a parallel situation. Assuming *arguendo* that it may be distinguished by the assertion that Bowman v. Lopereno, supra, involved a proceedings in bankruptcy, as did the later cases of Wayne United Gas Co. v. Owens-Illinois Glass Co. and Pfister v. Northern Illinois Co., supra,[5] nevertheless the rule developed in those cases is not peculiar to bankruptcy but is a rule of equity which bankruptcy has appropriated. The Supreme Court in the Wayne United Gas and Pfister cases said:

"It is true the bankruptcy court applies the doctrine of equity * * *" (300 U. S. 136)

"Courts of bankruptcy are courts of equity without terms * * *" (317 U. S. 152)

[5]300 U. S. 131, 81 L. Ed. 557, 57 S. Ct. 382.
317 U. S. 144, 87 L. Ed. 146, 63 S. Ct. 133.

Likewise, proceedings in equity, such as receiverships, are not restricted by terms of court. Since the adoption of Rule 6 (c) of the Rules of Civil Procedure,[6] terms of court are now anachronistic.

Sprague v. *Ticonic National Bank,* 307 U. S. 161, 83 L. Ed. 1184, 59 S. Ct. 777.

It follows that the order entered December 7, 1942 is now appealable and reviewable by this Court.

SPECIFICATION OF ERRORS

I.

The order entered by the trial court on December 7, 1942 which purported to allow and award appellant total compensation for all services rendered by him to the petitioning creditors of Intermountain in the class suit, and the creditors who elected to avail themselves of that suit, is grossly inadequate and inequitable, and it is erroneous for the reason that the award made to appellant by the order does not justly and adequately compensate appellant for the services rendered by him in the suit when measured by the hazards encountered, the labor expended, and the results obtained.

II.

The order entered by the trial court on December 7, 1942 which purported to allow and award appel-

[6]Rule 6(c): UNAFFECTED BY EXPIRATION OF TERM. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

lant, as and for a final award, total compensation for all services rendered by him is erroneous for the reason that the petition filed by appellant on October 15, 1937, as amended and supplemented, requested an allowance at that time of partial compensation for services rendered by appellant in the class suit only, whereas the trial court, by the order, purported to award appellant total and final compensation for services rendered to the petitioning creditors, to the receiver, and in the ancillary receiverships.

III.

The order entered by the trial court on December 7, 1942 is erroneous for the reason that it purports to award appellant compensation for all services rendered by him, whereas appellant at that time had not petitioned and requested compensation for services rendered to the receiver, and for services rendered in the ancillary receiverships, and consequently appellant was deprived of the opportunity and right to claim and prove the value of such services and to be heard thereon.

IV.

The order entered by the trial court on December 7, 1942 is erroneous for the reason that the petition upon which the order is founded, as amended and supplemented, claimed and requested compensation for services rendered by the appellant in the class suit only and consequently the order entered December 7, 1942 which purports to allow appellant total compensation for services rendered by him, including the services by appellant to the receiver, and in the ancillary receiverships, was beyond the jurisdiction and power of the trial court to render, in that

the order was not within the pleadings then filed or the issues then made.

V.

The trial court erred in entering the order of November 29, 1944, which denied and dismissed the petition filed by appellant on March 31, 1944 to review and rehear the order entered December 7, 1942, for the reason that the trial court entertained, considered, and disposed of the petition filed March 31, 1944, and then failed to exercise a sound judicial discretion in correcting the erroneous order entered December 7, 1942.

VI.

The trial court erred in entering the orders of December 7, 1942, and November 29, 1944, for the reason that the uncontroverted evidence which was received to support the petitions upon which the orders were entered, discloses that the amount of compensation awarded to appellant by the trial court is wholly inadequate and is not supported by the uncontroverted evidence.

VII.

The trial court erred in entering the orders of December 7, 1942, and November 29, 1944, for the reason that they constitute an abuse of sound judicial discretion in that they deprive appellant of compensation to which he is rightfully entitled and said orders unjustly enrich the receivership estate.

VIII.

The acceptance by appellant of the compensation awarded to him by the order entered December 7, 1942, less the compensation theretofore received by him, does not estop appellant from claiming addi-

tional compensation for services rendered to the petitioning creditors in the class suit, and to the receiver, and in the ancillary receiverships, for the reason that the acceptance by appellant of the compensation awarded him by the order entered December 7, 1942, was the acceptance of a minimum amount of compensation appellant was entitled to receive in all events; was less than the amount appellant reserved the right to claim; and did not compensate appellant for services rendered separately from the services rendered to the petitioning creditors, and which appellant then did not claim.

SUMMARY OF THE ARGUMENT

I.

The award made by the trial court to appellant by the order entered on December 7, 1942 is grossly inadequate and inequitable and, measured by the decision of this Court in Monaghan v. Hill, is founded upon error.

(Specification of Error I, p. 16, supra.)

An attorney who renders faithful and valuable services in a receivership proceedings is entitled to compensation in proportion to the efforts expended and the results obtained. The petition which appellant filed on October 15, 1937 (R. 108) for compensation for professional services rendered to the petitioning creditors in the class suit discloses the extent and value of the services rendered. The quality of the services are as commendable as they were beneficial to the petitioning creditors.

The petition filed by appellant on March 31, 1944 discloses the extent and value of the professional services rendered by appellant on behalf of the re-

ceiver, and in the ancillary receiverships. (R. 599). Appellant's affidavit in support of the petition then filed corroborates the extent and value of those services. (R. 620). The final report of Henry S. McCluskey, as receiver, discloses that appellant carried the legal burden of the receivership proceedings against difficult obstacles almost from the inception of the litigation until the day McCluskey, as receiver, was discharged. (R. 396). Appellant's labor extended into this Court, the Supreme Court of the United States, the District Courts of California, Oregon and elsewhere, including Wyoming and Idaho (R. 625, 626).

The pronouncement of this Court with respect to the quality of the services rendered by Elizabeth G. Monaghan applies equally to the services of appellant. In *Monaghan* v. *Hill,* this Court said:

> "A consideration of the great volume and high quality of the labor performed, the difficulty and novelty of the legal problems solved, the extreme hazard involved in the litigation which was handled for a 'reasonable' contingent fee, the high value of the property recovered, and the successful results achieved convinces us that the fee allowed is wholly inadequate."

If doubt had existed upon that question, it has been removed by the present receiver himself in the brief filed by him in *Monaghan* v. *Hill* (pps. 12, 13). The receiver there recited the character of the services performed by appellant and correctly and fairly represented to this Court the quality of those services as is revealed by the following excerpt from that brief:

> "The foregoing tends to show, as Mr. Nealon has stated, that all of the important work of this

case from the very beginning was performed by him. It is true that there is testimony by Mrs. Monaghan to the effect that Mr. Nealon did not at the beginning of the litigation want to become counsel of record for the creditors. If this is true, it may be surmised that Mr. Nealon wished to be free to be employed as attorney for the Receiver, if one should be appointed.

"But whatever the reason, it was apparent to the Court below and must necessarily be apparent to this Honorable Court from the record, that Mr. Nealon was the dominating spirit and the chief counsel in the litigation that brought the fund into court.

"While it is true that no contest was made by the receiver on the petitions filed by either Mrs. Monaghan or Mr. Nealon as attorneys, and 'no controverting evidence was offered,' still there is a direct conflict betewen the petitions filed by Mrs. Monaghan and Mr. Nealon, of which the Judge of the Court below must have taken cognizance. Mrs. Monaghan in her oral testimony did not question the statement of Mr. Nealon that 'all pleadings, briefs, or other business was formulated and dictated by me (Nealon) and prepared in my office,' nor the statement 'all of the expenses of litigation from the time the matter came into my (Nealon's) hands in the early part of 1932, to the time that the Receiver took physical possession in November, 1935, were advanced by me (Nealon) at the time they were incurred or paid.' Nor did Mrs. Monaghan question the fact that '* * * during the early part of 1932 and up to about a week prior to the petition for interlocutory decree in April, 1934, Mrs. Monaghan was in my (Nealon's) employ on a salary, but there never was at any time any partnership between us.' " (R. 613, 614).

Furthermore, the receiver again recited in that brief (p. 17) as follows:

"Viewing this case in the light of the record here, we feel that if the fee in fact was inadequate, and an abuse of discretion on the part of the District Judge, that it should have been Mr. Nealon who was here complaining and not Mrs. Monaghan, because, according to the record here, it was Mr. Nealon who 'bore the brunt of the struggle for the beneficiaries of the trust from the beginning to the end.' " (R. 615).

Undoubtedly, the order entered by the trial court on December 7, 1942 awarded compensation to appellant which was wholly disproportionate to the extent of the services performed and the benefits obtained.

II.

The order entered on December 7, 1942 purported to compensate appellant for services performed on behalf of the petitioning creditors, and also for services performed on behalf of the receiver, and in the ancillary receiverships, and consequently was beyond the jurisdiction of the trial court to enter, because the petition, upon which the order was founded requested compensation only for services rendered to the petitioning creditors and for an allowance at that time on account.

(Specification of Errors II, III and IV, pps. 16, 17, supra.)

The prayer of the petition filed by appellant on October 15, 1937 (R. 160, 161) recites as follows:

"Wherefore your petitioner prays that this Honorable Court allow to your petitioner such sum as it deems reasonable compensation to him for his services rendered in connection with the preparation, institution and trial of said cause, including the services rendered by him on the

> appeal from the interlocutory decree rendered herein to the Ninth Circuit Court of Appeals and for his services in opposing the petition of the defendant corporation and J. A. Malia to the Supreme Court of the United States for a writ of certiorari to review the proceedings in the District Court and Circuit Court of Appeals, such allowance to be on the basis of one-half of such sum as the Court may find to be a reasonable sum for all legal services rendered by the solicitors for the plaintiffs in the premises."

Appellant then claimed no compensation for services he had performed on behalf of the receiver, and in the ancillary receiverships. No evidence offered at that time supported a claim for, or an award of, compensation for such services. That question was not before the trial court and consequently appellant was given no opportunity to be heard thereon. Appellant first claimed compensation for services performed on behalf of the receiver, and in the ancillary receiverships, by the petition he filed on March 31, 1944 (R. 599) and by the supporting affidavit. (R. 620). Nevertheless the order of the trial court entered December 7, 1942 recited that the award there made constituted "total compensation fixed and allowed for all services rendered by petitioner." (R. 246). The order further recited "that this is a final allowance and covers all services heretofore rendered by said Thomas W. Nealon, as set forth in his said petition and as attorney for the former receiver." (R. 247).

The petition filed by appellant on October 15, 1937 came on for hearing December 20, 1937. (R. 245). At that time appellant filed a petition in writing (R. 594) which recites:

"PETITION FOR ALLOWANCE AND PAYMENT OF $12,500.00 UPON ACCOUNT OF FEES TO THOMAS W. NEALON.

"Comes now Thomas W. Nealon and supplementing his verified petition for attorney's fees heretofore filed in the above entitled matter respectfully petitions the Court for an order making an immediate allowance and payment of $12,500.00 upon account of fees for services rendered the plaintiffs in the preparation and conduct of the above entitled suit.

"This petition is based upon and supplementary to the petition for attorney's fees heretofore filed by him in this matter, together with the evidence this day presented in Court in support thereof. This petition to be without prejudice to the allowance heretofore prayed for in this proceeding."

At the time the petition was heard on December 20, 1937 appellant made a preliminary statement to the trial court and he then explained and confined the purpose of the petition by the following statement (R. 288):

"I am asking for a fee, as one of the solicitors for the plaintiffs in the class suit filed for certain named plaintiffs, and those similarly situated. I (am) asking the Court to allow me such reasonable compensation for the services renated, in connection with the preparation, institution and trial of the cause, including services rendered by me on the appeal from the interlocutory decree rendered by the Ninth Circuit Court of Appeals, for my services in opposing the petition of the defendant corporation and J. A. Malia in the Supreme Court of the United States, and filed upon a Writ of Certiorari, and for my out-of-pocket expenses necessarily in-

curred and paid by me in the sum of $1,330.40, and for services in obtaining final decree providing for the conveyance of all the property of the Intermountain Building & Loan Association to the Receiver of the defendant corporation.

Subsequently, during the hearing, appellant made the following statement to the trial court (R. 290, 291):

"My prayer in the petition is for only one-half of what would be a reasonable fee for the conduct of the case, and my petition differs from that of Mrs. Monaghan in this case, in that I ask that if the Court does not see proper at this time to allow the whole fee, that it make an allowance upon account. I think the latter is proper under the circumstances of the case, and under the evidence which I shall introduce, that a partial allowance at this time is the only way in which justice can be done to all parties, considering the amount of funds in the hands of the Receiver, the necessity, I might say, of the declaring a dividend, and the fact that it will probably be some time before all of the assets can be converted into cash. At the end of the case, at the end of the hearing I shall ask the right to file motions to that effect, and the petition along with them, so as to bring it directly before the Court, may be supplemental to the petition already filed."

Finally, near the close of the hearing, appellant again stated (R. 371):

"Now, I am looking at this case a little bit from that viewpoint of a man seventy years of age. I don't think in the present state of the case that all of the fees should be paid at the present time. Witnesses on the stand have testified to the part I was going to bring up myself,

but I do think it will be only fair to the attorneys in the case that at the present an allowance of some like amount would be proper. I, therefore, am filing this petition, and am asking for an allowance of $12,500.00 at the present time upon account of the fees. Your Honor can fix the fees at your leisure. I think these should be fixed on the percentage basis. This amount would be less than Five Dollars apiece, about Four-Fifty or Fifty-Eight from each of the people who have been benefited by the services. I would also leave in the treasury more than sufficient to declare a ten per cent dividend to these crdeitors, and I may say personally that I see no reason why a dividend should not be declared at any time your Honor deems proper. You can suspend the payment of the dividend so far as those people are claiming under the statutes out of the State, and about $12,500.00 will help an attorney to get along especially after he has been out of money as I have been in this case. I submit this and make the motion.

"The Court: All right. Let the record show it is submitted." (Italics supplied).

Every order or decree in a suit in equity is considered in connection with the pleadings, or, as here, the petition, and, if the order is broader than the petition, the order will be limited by construction so that its effect shall be only such as required by the issues thus made.

Reynolds v. *Stockton,* 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464.

Barnes v. *Chicago, etc. Railway,* 122 U. S. 1, 7 Sup. Ct. 1043, 30 L. Ed. 1128.

Standard Oil Co. v. *Missouri ex rel. Hadley,* 224 U. S. 270, 32 Sup. Ct. 406, 56 L. Ed. 760.

In *Reynold's* v. *Stockton,* supra, the rule is stated by the Supreme Court as follows:

> "First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. * * *" (35 L. Ed. 468).

In *Barnes* v. *Chicago,* supra, the Supreme Court said:

> "Every decree in a suit in equity must be considered in connection with the pleadings, and, if its language is broader than is required, it will be limited by construction so that its effect shall be such, and such only, as is needed for the purposes of the case that has been made and the issues that have been decided. Graham v. Railroad Co., 3 Wall, 704 (18 L. Ed. 247)."

In *Standard Oil Co.* v. *Missouri ex rel,* supra, the Supreme Court said:

> "For even if a court has original general jurisdiction, criminal and civil, at law and in equity, it cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action on which the proceeding was based. * * *"

These decisions of the Supreme Court were invoked by Judge Sawtelle, while sitting as District Judge, in the case of:

> *Clark* v. *Arizona Mut. Savings & Loan Assn,* 217 Fed. 640; cert. den. 238 U. S. 628, 35 Sup. Ct. 791, 19 L. Ed. 1496; affirmed by this Court in:
>
> *Farmers' & Merchants' Bank* v. *Arizona Mut. Savings & Loan Ass'n,* 220 Fed. 1

See also:

> *Drilling & Exploration Corporation* v. *Webster,* 9 Cir., 69 Fed. 2d 416, 418.

After this Court reviews the petition filed by appelant on October 15, 1937, and the oral statements made by him at the time the petition came on for hearing on December 20, 1937, together with the supplemental petition in writing filed at that time, we respectfully suggest that it will appear that the issue then presented did not support the order entered on December 7, 1942, and that consequently the trial court did not have jurisdiction to render, at that time, a final order depriving appellant of compensation he did not then claim or support, and upon which he had not been heard. Furthermore, appellant then reserved the right to claim additional compensation for services rendered in the creditors' suit.

It is significant that the trial court allowed and awarded appellant by the order of December 7, 1942, the amount he then claimed, $12,500.00, but less the amount he had previously received.

III.

The trial court entertained the petition filed by appellant on March 31, 1944 to review the order en-

tered December 7, 1942. The power was lodged in the trial court to entertain the petition, and, having exercised that power, the trial failed to exercise a sound judicial discretion by not correcting the erroneous and unconscionable order entered December 7, 1942.

(Specification of Errors V, VI and VII, p. 18, supra.)

We have seen that no legal impediment inhibited the trial court from reviewing, out of time, the order previously entered in this administrative proceedings. Here the trial court actually opened the order entered December 7, 1942 by entertaining, considering and disposing of the petition filed March 31, 1944 to rehear and review that order. It was then apparent from the decision of this Court in *Monaghan* v. *Hill* that the trial court had erred in the award made to appellant on December 7, 1942. The trial court had the power to correct the error of that order and failed to exercise a sound judicial discretin by refusing to do so. The power of the trial court, as we have shown, to correct the erroneous order entered December 7, 1942 flowed from the rule exemplified by the decisions of the Supreme Court which we have heretofore cited.[7]

Aside from those decisions, Rule 60 (b) of the Rules of Civil Procedure, 28 USCA, following section 723 (c), provides as follows:

[7]*Bowman v. Lopereno*, 311 U. S. 262, 85 L. Ed. 177, 61 S. Ct. 201.

Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U. S. 131, 81 L. Ed. 557, 57 S. Ct. 382.

Pfister v. Northern Illinois Co. 317 U. S. 144, 87 L. Ed. 146, 63 S. Ct. 133.

(b) MISTAKE; INADVERTENCE; SURPRISE; EXCUSABLE NEGLECT. On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceedin six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not effect the finality of a judgment or suspend its operation. *This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding,* or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U.S.C., Title 28, § 118, a judgment obtained against a defendant not actually personally notified. (Italics supplied).

The italicized exception contained in the last sentence of the foregoing rule imposes no limitation of time upon the power of the lower court to entertain an action[8] to relieve a party from a judgment, order or proceeding. Thus, the trial court retained its inherent power to correct its order entered December 7, 1924, especially in an administrative proceeding in equity not closed.

Bucy v. *Nevada Construction Co.* 9 Cir., 125 Fed. (2d) 213.

In that case, the District Court of Idaho remanded an action which had been removed from the state court. The order for remand was entered on November 27, 1939. Subsequently the Supreme Court

[8]The word "action" written into the rule is broad enough to embrace this proceeding. See: *Fiske v. Buder,* 8 Cir., 125 Fed. 2d 841, 844; *Cavallo v. Agwilines,* 2 F. R. Dec. 526.

in a different action rendered a decision in conflict with the decision of the District Court ordering the remand. On December 1, 1939, the District Court, on its own motion, vacated the order to remand. This Court on appeal sustained the order of the trial court vacating the order for remand, discussed Rule 60, supra, and said:

> "This rule of the United States District Court for Idaho states that the procedure shall be as prescribed in the General Rules of Civil Procedure for the District Courts of the United States. Rule 60 of these General Rules, 28 U.S.C.A. following section 723c, the Advisory Committee's notes thereon, and particularly the discussion appearing on page 185 of the Proceedings of the Institute at Washington, D. C., October 6, 7, 8, 1938, as published by the American Bar Association, support the theory of the inherent power of courts to correct their own errors.
>
> "As pointed out in the discussion of the Institute, this Rule 60 does not affect, interfere with, or curtail the common-law power of the federal courts, but as was emphasized, the broad power, which was theirs by the common-law, to deal with the situation where, in justice and good conscience, relief should be granted from manifest error, remained inherent in the courts.
>
> " 'The power to vacate judgments was conceded by the common-law to all its courts. Within its proper limitations it is a power inherent in all courts of record and independent of statute. It may be exercised by the court either of its own motion or on motion or suggestion by a party or interested person.* * *' 1 Freeman on Judgments, par. 194, pp. 375, 376."

See also:

> *Bateman* v. *Donavan,* 9 Cir., 131 Fed. (2d) 759.

In that case the trial court granted a new trial. Forty-seven days later the opposite party, by motion, attacked the order granting a new trial and the trial court set aside the order. In sustaining the later action of the trial court, this Court said:

> "* * * Appellee, in his motion filed forty-seven days later, attacked the propriety of the trial court's granting of a new trial upon a consideration of the juror's affidavit. In granting this motion of appellee and setting aside the order for a new trial the judge reasoned that there was not presented a proper case in which the affidavit of a juror might be received, on motion for a new trial, for the purpose of impeaching the verdict.
>
> "First of all, did the District Court have power to reconsider its order granting a new trial? Without citation of any authorities appellant questions the action of the Court. It is true, as pointed out by him, that the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, make no provision for such action, but it is likewise true that they do not forbid it. As illustrating the power of a federal trial court over its decrees and orders, we invite attention to the well-known principle that the court may vacate even final decrees at any time within the term (which principle remains unchanged under the new Rules, National Popsicle Corp. v. Hughes, D. C., 32 F. Supp. 397).* * *"

Let us assume that the trial judge, through inadvertence or mistake, had awarded appellant compensation in an amount more than he was entitled to receive. We do not think it could be successfully contended that the trial court could not have, under such circumstance, corrected the error and required appellant to pay back to the receivership estate the

amount of the over-payment. This Court has said that it may be done.

> *Drilling & Exploration Corporation* v. *Webster,* 69 Fed. (2d) 416, 418.

That was a receivership proceedings. The trial court ordered the attorney for the receiver to repay to the receivership estate an over-payment which had been made by the receiver, and this Court sustained that order.

And, conversely, the same power was lodged in the trial court to correct the order entered December 7, 1942, because, regardless of how the order was characterized, nevertheless it was an administrative order in equity subject to change or correction by the trial court.

Upon this question the court in *Drilling & Exploration Corporation* v. *Webster,* supra, (p. 418) said:

> "Furthermore when a court of equity appoints receivers of corporate property, its allowance to its receivers and their attorneys is an administrative order, presumptively right as to the justice of the allowance, and since orders for such allowances are purely administrative, they are subject to entire disallowance or change by either increase or decrease with the development of the administration. Hume v. Meyers (C.C.A.) 242 F. 827, 830."

Observing, therefore, that the trial court was vested with plenary power to correct the order entered December 7, 1942, it is difficult to understand why the trial judge did not do so after entertaining the petition filed March 31, 1944.

The directive of this Court in *Monaghan* v. *Hill* points as authoritatively to the inadequacy of the

award which the trial court made to appellant as it does to the inadequacy of the award which that court made to Mrs. Monaghan. The disinclination of the trial judge to adequately compensate appellant finds no support in an unilateral record which conclusively discloses that appellant deserves more by far than he was allowed. The obvious result is that the trial court, by denying adequate compensation to appellant, unjustly enriched the receivership estate.

This Court is now authorized to review the error of the trial court apparent not only from the order entered December 7, 1942, but also from the order entered November 29, 1944, and to correct the errors of those orders and to direct an award which adequately compensates appellant for his services.

In re Bowman, 9 Cir., 118 Fed. (2d) 742.

IV.

The acceptance by appellant of the compensation awarded to him by the order entered December 7, 1942 does not now estop appellant from claiming additional compensation for services rendered which appellant claimed in the petition filed March 31, 1944.

(Specification of Error VIII, page 18, supra)

We have seen that appellant at the time he filed the petition on October 15, 1937 which came on for hearing December 20, 1937, then requested an award on account in the amount of $12,500.00, and that appellant, at that time, reserved the right to claim additional compensation for services performed for the petitioning creditors in the class suit. Appellant did not then claim compensation for services performed for the receiver, and in the ancillary receiver-

ships, but claimed compensation for those services for the first time by the petition filed on March 31, 1944 to review and rehear the order entered December 7, 1942. (R. 599).

By the fifth, sixth and seventh defenses set up in the answer filed by appellee, as receiver, to the petition filed by appellant on March 31, 1944 (R. 639-641) appellee pleaded payment to appellant of the award made by the order entered December 7, 1942. Payment was made by the receiver's check, a copy of which is pleaded in the answer. (R. 642). The check was dated December 10, 1942, and was drawn by the receiver to the order of appellant in the sum of $6,330.40. This sum represents the award of $12,500.00 made by the order entered December 7, 1942, less $7,500.00, which had theretofore been paid to appellant,[9] plus $1,330.40 for appellant's expenses allowed by the order entered December 7, 1942. (R. 245).

Appellant, by the issues formulated on the pretrial conference, admitted payment of the receiver's check, but denied that the payment deprived appellant of the right to claim additional compensation as was claimed in the petition filed March 31, 1944. (R. 650).

Under the circumstances disclosed by the record on this appeal, acceptance by appellant of the award made December 7, 1942, did not deprive appellant of the right to claim additional compensation for services rendered to the petitioning creditors in the class suit, and also for services rendered to the receiver, and in the ancillary receiverships, as appel-

[9]The amount which had been paid to appellant was not a salary as the order recites (R. 245) but was paid on a drawing account under a prior order of the Court. (R. 385, 386).

lant did claim in the subsequent petition filed March 31, 1944.

The order entered December 7, 1942 in this administrative proceedings in equity was subject to review by the trial court, and the amount awarded to appellant by that order can be increased or decreased before the proceedings are closed as the circumstances warrant.

Drilling & Exploration Corporation v. *Webster,* 9 Cir., 69 Fed. (2d) 416.

The trial court entertained the petition filed by appellant on March 31, 1944 to review and rehear the order entered December 7, 1942. That order, in its entirety, was then placed under review by the trial court and was subject to correction as the circumstances then required.

The acceptance of the amount of the award made by the order entered December 7, 1942 did not impair the power of the trial court to correct that order when it came under review. The trial court had the power, if it then appeared that appellant had been over-paid as the result of inadvertence or mistake, to require appellant to refund to the receivership estate the amount of the over-payment, and the trial court had the correlative power to increase the award made as the result of error, as here.

Payment was no insurmountable bar to a revision of the order entered December 7, 1942, for certainly there can be no distinction between requiring a refund of payment received by an attorney in a receivership proceedings and ordering an increase of an award theretofore made to an attorney in a receivership proceedings through error.

Drilling & Exploration Corporation v. *Webster,* **supra.**

While we think the rule of this Court announced in the decision last cited is sufficient to dispose of the defense of payment asserted by appellee in the answer, nevertheless an additional reason supports the contention of appellant that the acceptance of the award made by the order entered December 7, 1942 does not estop appellant from claiming such additional compensation as may be just and proper as now disclosed by this record on appeal.

The receiver's defense that appellant by accepting the benefits of the order entered December 7, 1942 is now estoped from claiming additional compensation is not sustained simply by the assertion of that defense. The rule that the acceptance of the benefit of a judgment or order forecloses a review of them is subject to qualifications or exceptions, one of which is that the acceptance by appellant of that which confessedly he was entitled to, does not estop him from claiming that which is justly due him. The exception to the rule which is applicable here is found in the following decisions of the Supreme Court:

> *Embry* v. *Palmer,* 107 U. S. 3, 2 S. Ct. 25, 27 L. Ed. 346, citing United States v. Dashiel, 3 Wall. 688.
>
> *Reynes* v. *Dumont,* 130 U. S. 354, 9 S. Ct. 486, 32 L. Ed. 934.
>
> *Erwin* v. *Lowry,* 7 How. (48 U. S.) 172, 184, 12 L. Ed. 655.

Embry v. *Palmer,* supra, involved an action wherein Embry, as administrator, secured a judgment in the Supreme Court of the District of Columbia against Palmer and Stanton for $9,185.18 for claims recovered by his intestate against the United States in favor of Palmer and Stanton. Subsequently Embry brought suit against the judgment debtors in the

Superior Court of Connecticut where they resided. The judgment debtors filed a petition in the same court to restrain Embry from enforcing the judgment on their payment of $2,296.29, which they alleged was the only amount Embry was equitably entitled to receive. The issue reached the Supreme Court of Errors of Connecticut which granted relief to Palmer and Stanton on condition that they pay to Embry said sum of $2,296.29. That amount was paid to and accepted by Embry's attorney and the Supreme Court of Errors of Connecticut then enjoined Embry from further prosecuting his main suit for the amount of the judgment obtained in the District of Columbia. Embry had a writ of error to the Supreme Court of the United States and Palmer and Stanton asserted that Embry was estopped from prosecuting the writ (using the language of the Supreme Court of the United States) "because it appears that the amount of money ordered by it (Supreme Court of Errors of Connecticut) to be paid to him (Embry) as condition of relief granted has been accepted by him." The Supreme Court rejected the contention, reversed the Supreme Court of Errors of Connecticut, and upon the question of estoppel (107 U. S. 8) said:

> "A suggestion is made in argument that Embry is estopped to prosecute this writ to the reversal of the decree below, because it appears that the amount of money ordered by it to be paid to him as a condition of relief granted has been accepted by him. It is said that this is release of errors. Without entering upon a discussion of the general question, it is sufficient for the present purpose to say that no waiver or release of errors, operating as a bar to the further prosecution of an appeal or writ of error, can be implied, except from conduct which is in-

consistent with the claim of a right to reverse the judgment or decree, which it is sought to bring into review. If the release is not expressed, it can arise only upon the principle of an estoppel. The present is not such a case. The amount awarded, paid, and accepted constitutes no part of what is in controversy. Its acceptance by the plaintiff in error cannot be construed into an admission that the decree he seeks to reverse is not erroneous; nor does it take from the defendants in error anything, on the reversal of the decree, to which they would otherwise be entitled; for they cannot deny that this sum, at least, is due and payable from them to him. But in every point of view the objection is met and answered by the decision of this court in the case of *United States* v. *Dashiel,* 3 Wall. 688."

In *Reynes* v. *Dumont, supra,* there was involved the question of a right to liens upon bonds to secure payment of certain drafts. The Circuit Court decreed that the liens were impressed upon the bonds and the liens were satisfied by payment. Appellants received the remaining bonds after the liens were satisfied, and it was asserted that the acceptance of the bonds disposed of the right of appeal. But the Supreme Court rejected the contention (130 U. S. 394) and said:

"We are asked to dispose of the case adversey to appellants upon the ground that they received the remaining bonds and money after the liens decreed in Fry's favor were satisfied; but such receipt does not oust the jurisdiction. The acceptance by appellants of what was confessedly theirs cannot be construed into an admission that the decree they seek to reverse was not erroneous, nor does it take from appellees anything on the reversal of the decree, to which

they would otherwise be entitled. *Embry* v. *Palmer,* 107 U. S. 3, 8.* * *"

Appellant's case cannot be placed without the import of the foregoing decisions. He limited his petition first filed to compensation for services performed to the petitioning creditors in the class suit. Appellant amended and supplemented that petition by then requesting an allowance *on account* of $12,500.00, and reserved the right to ask for more. (R. 594). Appellant then claimed no compensation for srevices performed by him for the receiver, and in the ancillary receiverships, to which he was entitled. Thus appellant was entitled, in all events, to the amount which the trial court awarded him by the order entered December 7, 1942. That appellant is entitled to more, as he reserved the right to claim, is now established beyond dispute. *Monaghan* v. *Hill, supra.*

Armstrong v. *Lone Star Refining Co.* 8 Cir., 20 Fed. (2d) 625, exemplifies the rule in the national courts. In that case a creditor in a receivership proceeding filed his claim and claimed a preference. The lower court allowed the claim as a general one only. The creditor accepted a dividend paid on general claims, and afterwards appealed. Motion was made in the Circuit Court of Appeals to dismiss the appeal upon the claim that appellant, having accepted the dividend on general claims, was estopped to prosecute his appeal from the decree which disallowed his claim as a preferred one. The Circuit Court of Appeals rejected the contention and said:

"On July 28, 1926, the court made an order in the main suit, directing the receivers to pay a 20 per cent. dividend on general claims. The intervener was paid, and he retained, this divi-

dend on his claim. Motion is made in this court by appellees to dismiss the appeal, on the ground that appellant, having accepted the dividend, is now estopped to prosecute the appeal from the decree which allowed his claim and in accordance with which his dividend was paid.

"The well-settled rule that a party who enforces, or otherwise accepts the benefits of a judgment, order, or decree, cannot afterward maintain an appeal or writ of error to review the same, is subject to numreous qualifications and exceptions. The rule has no application to a case where the appellant is concededly entitled in any event to the sum which he has received. 3 C. J. 682, par. 556; United States v. Dashiel, 3 Wall. 688, 702, 18 L. Ed. 268; Embry v. Palmer, 107 U. S. 3, 8, 2 S. Ct. 25, 27 L. Ed. 346; Reynes v. Dumont, 130 U. S. 354, 394, 9 S. Ct. 486, 32 L. Ed. 934; Carson Lumber Co. v. St. L. & S. F. R. Co., 209 F. 191 (C.C.A. 8); Snow v. Hazelwood (C.C.A.) 179 F. 182. This exception to the general rule is recognized in the cases cited by appellees. Spencer v. Babylon R. Co. (C.C.A.) 250 F. 24; In Re Minot Auto Co., 298 F. 853 (C.C.A. 8).

"In the case at bar the face amount of the claim of intervener is undisputed, and its validity as a general claim is also undisputed. Whether intervener succeeds on his present appeal or not, he will be entitled to share with the other creditors, at least on the basis of the allowance of his claim as a general one. This being the situation, the intervener is within the exception noted to the general rule above stated. The motion to dismiss the appeal must therefore be denied."

To the same effect are:

Idaho Irrigation Dist. v. *Gooding,* 9 Cir., 285 Fed. 453, 461.

Snow v. *Hazelwood,* 5 Cir., 179 Fed. 182.

Words of limitation or condition written by the receiver into his check cannot impair or destroy the legal effect of the order under which the check was written. The receiver is the arm of the court. Consequently in the present case he stands not in the relationship of judgment creditor in the sense that he may invoke that relationship against appellant as a judgment debtor. On the contrary the receiver's check, regardless of recitals, like the order under which it was written, was under the continuing control of the trial court so long as the receivership proceedings were not closed.

CONCLUSION

The professional efforts expended by appellant, and the fruits of those efforts, present a case, we think, that justifies redress by the remedies invoked below and here. The remedies, and the epitome of the argument to sustain them, find their source in a principle of equity which is crystalized in the maxim that equity will not suffer a wrong to be without a remedy. Appellant is content to rest his case upon that principle as exemplified by the authoritative decisions which are cited on the preceding pages.

It is respectfully prayed that the orders of the trial court appealed from be reversed and remanded with direction that the trial court order payment to appellant from the receivership assets such sum as appears to this Court adequate for all the services rendered.

Respectfully submitted,

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Attorney for Appellant.

THOMAS W. NEALON,
In Propria Persona

No. 10961

United States Circuit Court of Appeals

For the Ninth Circuit

THOMAS W. NEALON,

Appellant,

vs.

HARRY W. HILL, as Receiver of Intermountain Building & Loan Association, a corporation,

Appellee.

BRIEF FOR APPELLEE

Upon Appeal from the District Court of the United States for the District of Arizona

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No. 10,961

United States Circuit Court of Appeals

For the Ninth Circuit

THOMAS W. NEALON,

Appellant,

vs.

HARRY W. HILL, as Receiver of Intermountain Building & Loan Association, a corporation,

Appellee.

BRIEF FOR APPELLEE

Upon Appeal from the District Court of the United States for the District of Arizona

JURISDICTION OF DISTRICT COURT

The statute believed to sustain jurisdiction of the District Court is Section 41, Title 28, U.S.C.A., for the reason that the original proceeding in the District Court was in the nature of a class suit where the matter in controversy exceeded, exclusive of interest and costs, the sum of $3,000 and was between citizens of Arizona and a citizen of the

State of Utah (*Intermountain Building & Loan Association, a Utah corporation v. Gallegos, et al.,* 78 Fed.(2) 972).

The District Court under the same section had jurisdiction to enter the final order of December 7th, 1942 (243).

As will be shown in the argument and by the record herein, we believe that the District Court had no jurisdiction by virtue of the petition filed by appellant on March 31, 1944 (599-619).

JURISDICTION OF CIRCUIT COURT OF APPEALS

The statute believed to sustain appellate jurisdiction in so far as the class suit and the final order of December 7th, 1942, are concerned, is Section 225, Title 28, U.S.C.A.

Appellee believes, however, that by virtue of the record here this Honorable Court is without jurisdiction, except to dismiss the attempted appeal, for the reasons stated in the argument, *infra,* and, in any event, because an appeal cannot be taken from a final order where appellant has accepted the benefits thereof; a bill of review will not lie for the same reason.

STATEMENT OF THE CASE

The statement of the case set forth in the brief of appellant is substantially correct but we believe that a step by step statement will more materially aid this Honorable Court in passing on the questions presented by this appeal.

On October 17th, 1937, appellant filed in the court below his petition for allowance of attorney's fees for legal serv-

ices rendered and expenses incurred (108-164). That petition, for all practical purposes, is substantially the same as the petition thereafter filed by Elizabeth G. Monaghan (43-108), and previously considered by this Court.[1]

On December 20th, 1937, a hearing was had on the petition filed by appellant here, at the conclusion of which hearing, both the petitions of appellant and Monaghan were, by the Court, taken under advisement (593).

On the day of the hearing, appellant filed a petition for payment of out-of-pocket expenses paid by him (593), and on the same day filed a separate petition for allowance and payment of $12,500 upon account of fees (594).

Thereafter, and on February 18th, 1938, the Court below made its order allowing appellant $5,000 and authorized, empowered and directed the Receiver to pay said sum of $5,000 and, in said order, retained jurisdiction "to make and enter such other and further order in the premises as to it shall seem just and equitable" (595-596).

On March 3rd, 1939, the Court entered a further order for allowance and payment of attorney's fees for legal services rendered by appellant reciting the allowance of February 18th, 1938, of $5,000 and ordering an additional $2,500 allowed to appellant on account and authorizing, empowering and directing the Receiver to pay such additional sum of $2,500. The Court likewise in the order of March 3rd, 1939, retained jurisdiction "to make such other and further order in the premises as to it may seem just and equitable" (597-598).

1. *Monaghan v. Hill,* 9 Cir. 140 Fed.(2) 31.

Thereafter, and on the 7th day of December, 1942, the Court below entered its "Final Order Fixing Attorney's Fees and Expenses and Ordering Payment of Balance Due Thomas W. Nealon" (243-248), in which final order there was recited the payments of $5,000 in February, 1938, and $2,500 additional in March, 1939, and fixing the total fees of both Monaghan and Hill at $25,000, and awarding appellant one-half (½) of said sum, less the $7,500 theretofore paid him on account, pursuant to orders of Court.

In the final order of December 7th, 1942, a further allowance of $1,330.40 was made appellant to cover out-of-pocket expenses claimed by him and established to be due at the hearing held on December 20th, 1937.

There was further recited in that order that between the dates of December 1st, 1935 and April 1st, 1937, appellant received $7,344 covering salary and expenses as one of the attorneys for the former Receiver, Henry S. McCluskey. The balance of the fee allowed appellant, to-wit, $5,000, and the out-of-pocket expenses amounting to $1,330.40, were ordered paid by the Receiver, and appellant was decreed to have a lien upon the assets of the Loan Association until such sums were paid. It was

> "Further Ordered, Adjudged and Decreed * * * that this is a final allowance and covers all services heretofore rendered by said Thomas W. Nealon as set forth in his petition and as attorney for the former Receiver."

Subsequent to the entry of the final order of December 7th, 1942, and on the 10th day of December, 1942, and in accordance with such final order, the Receiver paid to

appellant, and appellant accepted from the Receiver, $6,330.40, covering the following items specified in the voucher check (642), to-wit:

"Date of Invoice No.	Items	Amount	Total
B-202—	Final Payment in Full Settlement of Attorney Fees Per Order of Court of December 7, 1942	$5,000.00	
	Expenses Allowed Per Order of Court of December 7, 1942	1,330.40	
			$6,330.40"

Said check bore the following endorsement (643):

"Endorsement

Endorsement of this check acknowledges payment in full for all of the invoices listed on the voucher on the reverse side of this check.

THOMAS W. NEALON"

There is no denial that appellant cashed the voucher check referred to and accepted and retained the full benefits and fruits of the final order of December 7th, 1942. The final order was based on an *unliquidated* claim.

Nothing further was heard from appellant until March 31st, 1944, some fifteen (15) months and twenty-one (21) days after the actual receipt of the payment made by the Receiver pursuant to such final order, when appellant filed a document in the court below entitled:

> "Petition of Thomas W. Nealon requesting this honorable Court to review and rehear final order fixing attorney's fees and expenses of Thomas W. Nealon, made and entered herein on December 7, 1942" (599).

The prayer of said petition is:

"(a) That the order of this Court entered herein on December 7, 1942, allowing and awarding to petitioner compensation and expenses in the amount therein recited, be vacated for the want of jurisdiction of this Court to render said order, and that a supplemental order be made and substituted therefor by this Court allowing and awarding to petitioner compensation in such amount as now appears from the entire record herein to be right and proper.

(b) That this Court, as in the nature of a bill of review, or by an original bill in equity, review said petition filed herein by petitioner on October 15, 1937, and said order entered herein on December 7, 1942, and upon such review that this Court correct the errors of law and fact *apparent in said order,*[2] and thereupon allow and award to petitioner compensation in such amount as now appears from the entire record herein to be just and proper.

(c) That this Court grant a rehearing of said order entered herein on December 7, 1942, awarding compensation to petitioner, and upon such rehearing that this Court thereupon allow and award to petitioner compensation in such amount for all services performed by petitioner as now appears from the entire record herein to be just and proper.

(d) That this Court modify and revise said order entered herein on December 7, 1942, so as to allow and award compensation to petitioner for all services performed by petitioner as now appears from the entire record herein to be just and proper (618).

(e) (Immaterial)

2. Emphasis ours throughout this brief, unless otherwise noted.

(f) And for such other and further relief as may appear just and equitable." (619).

In the meantime, and on January 21st, 1944, this Honorable Court in *Monaghan v. Hill,* 140 Fed.(2) 31, held that the $12,500 allowed Mrs. Monaghan was insufficient and that she was entitled to "such a fee as to the District Court may seem right and proper but in a sum not less than $50,000."

It was after this decision that the appellant apparently decided that he had probably made a mistake by not appealing from the final order of December 7th, 1942, as did Mrs. Monaghan, and he is now trying to set aside that final order from which, until now, he has taken no appeal.

It is admitted that no appeal was taken within the time required by law, nor was any action whatsoever taken by appellant until March 31st, 1944 (page 13, Brief of Appellant).

On January 28th, 1936, the court below (Judge Jacobs presiding) entered an "Order for Monthly Allowance of Attorney Fees to Thomas W. Nealon", in which order the then Receiver, H. S. McCluskey, was "authorized and directed to pay to said Thomas W. Nealon, the sum of $300.00 and $159.00 per month for expenses, for his services as such attorney, up to the first day of January, 1936, and a like amount on the first day of each and every month on account thereafter until further orders of this Court" (385-386).

Prior to the date of that order, and on November 30th, 1935, the Court had entered an order appointing Thomas W. Nealon and Elizabeth G. Monaghan attorneys for the

then Receiver (386) and on the same date as the order fixing appellant's fees, the Court fixed the fees of Elizabeth G. Monaghan at $250.00 a month (384).

On the date that the orders were entered fixing the fees of Monaghan and appellant, the Court entered a further order appointing an additional attorney for the Receiver and naming John L. Gust as such additional attorney (386), and the Court fixed Mr. Gust's allowance as $300.00 a month "until further orders of this Court" (389).

After the appellant filed his petition on March 31st, 1944 (599), the appellee filed his answer (632), the first two defenses of which questioned the jurisdiction of the Court, and the third defense alleged that the petition "fails to state a claim upon which relief can be granted". The fourth defense was a categorical answer to the petition. The fifth, sixth and seventh defenses go to the payment of the money awarded by the order of December 7th, 1942, and the acceptance of such money by the appellant.

An order was made following a pre-trial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure (643), which order was dated June 7th, 1944.

On November 21st, 1944, appellant filed a "Motion to Submit Petition" (651), and on the 22nd day of November, 1944, appellee filed a "Motion for Order Denying Petition and Dismissing Same" (653).

Briefs were filed, and on the 22nd of November, 1944, a stipulation was entered into to submit both motions on briefs without oral argument (652), and an order was made that the motions "be and the same are hereby submitted for decision" (653).

On November 22nd, 1944, the Court, by minute entry, made the following order:

> "It is Ordered that the Receiver's Motion for an Order Denying Petition of Thomas W. Nealon requesting this Honorable Court to review and rehear final order fixing attorney's fees and expenses of Thomas W. Nealon, made and entered herein on December 7, 1942, and dismissing same be and it is granted". (655-656).

On November 29th, 1944, attorneys for appellant and appellee were present in Court, and the appellant stated he desired the record to show that he declined to amend or plead further in the case (657), whereupon the Court entered its "Final Order Denying Petition and Dismissing Same" (657-658), in which it was, among other things,

> "Ordered, Adjudged and Decreed that the petition of Thomas W. Nealon filed herein on March 31st, 1944, be denied and the same is hereby dismissed with prejudice" (658).

The appeal is taken

> "* * * from that certain order made and filed herein on December 7, 1942, entitled: "Final Order Fixing Attorney's Fees and Expenses, and Ordering Payment of Balance Due Thomas W. Nealon," and entered herein on the Clerk's Docket on December 7, 1942.
>
> "The said Thomas W. Nealon also appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that certain order made and filed herein on November 29, 1944, entitled: 'Final Order Denying Petition and Dismissing Same,' and entered herein on the Clerk's Docket on November 29, 1944" (666).

SUMMARY OF THE ARGUMENT

Appellee's argument will be divided into subheads, which necessarily will cover the eight specifications of error set forth in the brief of appellant and will likewise present appellee's reasons why the appeal taken by appellant should be dismissed or the order denying the petition and dismissing same affirmed.

Appellee presents for this Honorable Court's consideration, the following reason why this appeal should be dismissed, or, in the alternative, that the order of the court below denying petition and dismissing same (657), on the grounds set forth in the motion filed by appellee (653-655), should be affirmed:

(a) An order or decree which adjudges that an attorney is entitled to compensation in a definite amount and allows a lien therefor on a fund in court and directs payment, is a final order and appealable although no final disposition is made of the residue of the fund.

(b) Appellant in his attempted appeal from the order of December 7th, 1942, is too late, as an appeal from such an order must be taken within three (3) months from the entry thereof.

(c) The order of November 29th, 1944, is not a final decision within the meaning of Section 128(a) of the Judicial Code, 28 U.S.C.A., Section 225(a) and is not appealable.

(d) An attorney accepting the benefits of a final order or judgment and retaining the fee allowed thereby, cannot thereafter appeal therefrom.

(e) A bill of review, or a bill in the nature of a bill of review, will not lie in this case because appel-

lant, having accepted the benefits of the order of December 7th, 1942, is now estopped from reviewing same; he cannot accept its benefits and escape from its burdens.

(f) A bill of review for errors apparent on the face of the record will not lie after the time allowed for appeal has elapsed.

(g) A bill of review, or a bill in the nature of a bill of review, will not lie where no fraud is alleged, or where there is no newly discovered evidence claimed, unless there is error apparent on the face of the record.

(h) The time for considering a judgment or order that has become final cannot be extended unless a motion to review, rehear, modify, revise or vacate such order has been seasonably filed and that an unseasonably filed motion or petition, although it may be considered on its merits, cannot have the effect of extending the time to appeal from the original order or judgment.

(i) A motion for rehearing or a motion for a new trial must be filed seasonably and within the time provided by the Rules of Civil Procedure.

(j) Lack of diligence in filing petition.

(k) The failure of the Court to find the facts specially and state separately its conclusions of law thereon as provided by Rule 52 does not make the judgment void.

ARGUMENT

(a) An Order or Decree Which Adjudges That An Attorney Is Entitled to Compensation in a Definite Amount and Allows a Lien Therefor on a Fund in Court, and Directs Payment, Is a Final Order and Appealable Although No Final Disposition Is Made of the Residue of the Fund.

The first and second defenses in the Receiver's answer go to the jurisdiction of the lower court to consider the petition. The third defense is that the petition fails to state a claim upon which relief could be granted.

We are firmly convinced that the petition on its face shows, as a matter of law, that it was correctly denied and ordered dismissed.

It will be noted that appellant questions the finality of the order of the Court entered December 7th, 1942, and claims in his petition that said order was an "interlocutory administrative order in equity" now subject to control and revision by this Court and he seeks, apparently, a new or supplementary order "which allows and awards to petitioner just and proper compensation for all services performed by petitioner, as set forth in the petition filed by him on October 15, 1937, as supplemented, and in this petition, and by the record herein".

If appellant was dissatisfied with the fee allowed him in the Court's order of December 7th, 1942, he should have appealed therefrom within the time provided by statute to perfect his appeal, inasmuch as the order entered was final.

> *Monaghan v. Hill,* 9 Cir., 140 Fed.(2) 31, 33;
> *Trustees v. Greenough,* 105 U.S. 527.

In *Cyclopedia of Federal Procedure* (2nd Ed.), Volume 10 at page 252, it is said to be the law that,

> "An order relating to attorney's fees and disbursements is appealable where a final decision, but not otherwise, as where it is in one of its substantial parts reserved for further adjudication. *A decree which adjudges that an attorney is entitled to compensation in a definite amount and allows a lien therefor on a fund in court, and directs payment, is appealable although no final disposition is made of the residue of the fund.*"

Trustee v. Greenough, supra, was a case where fees were applied for where a fund was brought into court and one of the questions presented was whether the order fixing these fees amounted to a *final decree* and the Supreme Court of the United States, speaking through Mr. Justice Bradley, said:

> "The first question, however, is whether these orders do or do not amount to a final decree, upon which an appeal lies to this court. They are certainly a final determination of the particular matter arising upon the complainant's petition for allowances, and direct the payment of money out of the fund in the hands of the receiver. Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision. The administration of the fund for the benefit of the bondholders may continue in the court for a long time to come, dividends being made from time to time in payment of coupons still unsatisfied. The case is a peculiar one, it is true; but under all the circumstances, we think that the proceeding may be regarded as so far independent as to make the decision substantially a final decree for the purposes of an appeal." (105 U.S. page 531)

See, also:

Reeves v. Beardall, 316 U.S. 283; 62 Sup. Ct. 1085;
Dexter Horton National Bank of Seattle v. Hawkins, et al. (9 Cir.), 190 Fed. 924;
Gripton v. Richardson (9 Cir.), 82 Fed.(2d) 313;
Gelberg v. Richardson (9 Cir.), 82 Fed.(2) 314, 315.

In *Gripton v. Richardson, supra,* this Court, speaking through Judge Mathews, held that although a decree confirming a Special Master's Report did not terminate the Receivership proceeding, still,

> "* * * decree determined appellant's rights by allowing her claim in part only and refusing to treat it as a secured or preferred claim. Such a decree is 'final', within the meaning of Section 128 of the Judicial Code, as amended, 28 U.S.C.A., Section 225, and is, therefore, appealable. (Citing cases)."

In the case following, *Gelberg v. Richardson,* on page 315, this Court, in passing on the finality of the decree rejecting the claim of an attorney for a committee of the corporation's creditors against the corporation's receiver for attorney's fees and services rendered the receivership proceeding, held that the decree was a "final decree" within the meaning of Section 225, Title 28, U.S.C.A., although such decree did not terminate the receivership proceeding.

Both the *Gripton* and the *Gelberg* cases, *supra,* cite *Dexter Horton National Bank v. Hawkins, supra.*

In *Tuttle v. Claflin* (2 Cir.), 88 Fed.(2) 122, it is held in effect that a decree entered in a proceeding by attorneys to enforce a lien for their fees, which adjudged that they

are entitled to compensation in a definite amount, and to have a lien therefor on a fund in court, and directs payment thereof, is a final appealable decree although the residue of the fund may not have been finally disposed of.

See, also:

Jacksonville T. & K. W. Ry. Company, et al. v. American Construction Company, et al. (5 Cir.), 57 Fed. 66;

Ruggles, et al. v. Patton (6 Cir.), 143 Fed. 312;

Central Trust Co. of New York v. United States Light & Heating Co., et al. (2 Cir.), 233 Fed. 420;

Sawyer v. Ellis, et al., 36 Ariz. 419, 286 P. 189.

It will be seen, therefore, that the order of December 7th, 1942, allowing appellant attorney's fees in this matter was *a final order* as a matter of law.

These cases are not to be confused with cases like *Heinz v. Butte and Boston Consolidated Mining Company,* 129 Fed. 337, and *Colley v. Wolcutt,* 187 Fed. 595. In the *Heinz* case, there was *an interlocutory order* confirming a receiver's report and directing the receiver to pay expenses incurred by him before the coming on of his final account. This was held not a final order. In the *Colley* case, an allowance was made for services of attorneys but the order provided that the allowance should be thereafter paid in such manner *as the court should direct.* This was held *not to be a final order.* Neither of these cases portray the situation in the case at bar.

(b) Appellant in His Attempted Appeal From the Order of December 7th, 1942, Is Too Late, As An Appeal From Such An Order Must Be Taken Within Three (3) Months From the Entry Thereof.

The attempted appeal from the order of December 7, 1942 (243), is too late because the order became final and the time to appeal expired three (3) months after the entry of the order.

Monaghan v. Hill (9 Cir.), 140 Fed.(2) 31, 33;
U. S. C. A., Sec. 230, Title 28.

This is not applicable, however, if a timely petition to vacate order or rehear same is filed (*Mitchell v. Maurer* (9 Cir.), 67 Fed.(2) 286).

(c) The Order of November 29th, 1944, Is Not a Final Decision Within the Meaning of Section 128(a) of the Judicial Code, 28 U.S.C.A., Section 225(a) and Is Not Appealable.

That part of the appeal directed to the order of the Court entered on November 29th, 1944 (666), is not, in appellee's judgment, an appealable order within the meaning of Section 225(a), Title 28, U.S.C.A.

Donavan v. Jeffcott, et al. (9 Cir.), 147 Fed.(2) 198, and cases therein cited;
10 *Cyc. Fed. Proc.* (2nd Ed.), Sec. 4892, page 279;
Cobbledick v. U. S., 309 U.S. 323, 60 S. Ct. 540.

(d) An Attorney Accepting the Benefits of a Final Order or Judgment and Retaining the Fee Allowed Thereby, Cannot Thereafter Appeal Therefrom.

In Paragraph X of the petition to review and rehear final order fixing attorney's fees, etc., it is definitely alleged that in accordance with the order entered on De-

cember 7th, 1942, that appellant accepted the balance of Five Thousand ($5,000.00) Dollars authorized by said order, plus the further sum of $1,330.40 expenses (605, 606). It is further alleged in that paragraph that between December 1st, 1935, and April 1st, 1937, appellant had been paid an additional sum of $7,344.00 in monthly payments *as and for a drawing account.* The seventh defense in the Receiver's answer sets forth the check covering the attorney's fees and expenses (642), which check bore on its reverse side the notation and endorsement set forth in the statement of the case, *supra.*

At the pre-trial conference, it was readily admitted by appellant that the money was paid to, and received by him pursuant to the order but it was contended that such order was not a final order. Of course, this latter statement by appellant is not borne out by the law.

It is the general rule (adopted in Arizona)[3] that a party cannot accept the benefits of a judgment, order or decree and afterward prosecute an appeal or writ of error to review the same; and that he cannot, in case of interdependent provisions, accept the benefits of the part which is favorable and appeal from the part which is unfavorable; nor can he, in making such acceptance, reserve the right to appeal (4 *C.J.S., "Appeal and Error",* Paragraph 215, page 414).

In the same volume of *Corpus Juris Segundum,* in Paragraph 216, under the heading "Acceptance of Payment", it is said in effect that a party cannot prosecute an appeal or writ of error to reverse a judgment or decree after

3. *Shannon Copper Co. v. Potter,* 14 Arizona 481, 131 Pac. 157.

having acquiesced therein by voluntarily accepting money tendered by the judgment debtor in discharge of the judgment and that "this rule is particularly true *where the money is accepted in complete settlement and satisfaction of the judgment*".

In 2 *American Jurisprudence,* Paragraph 214, page 975, it is stated as a general rule that *a litigant who has, voluntarily and with knowledge of all the material facts, accepted the benefits of an order, decree or judgment of a court, cannot afterwards take or prosecute an appeal* or error proceeding to reverse it, and that generally no distinction is made between a judgment at law or a decree in equity, and, as stated by the author in *American Jurisprudence, supra:*

> "* * * —in other words, that the right to proceed on a judgment and enjoy its fruits and the right to appeal therefrom are totally inconsistent positions, and the election to pursue one course must be deemed an abandonment of the other."

Of course, *the mere tender* of the benefits of a judgment, which is refused, does not operate as an estoppel (2 *Am. Jur.,* page 977).

In *Smith v. Morris, et al.* (3 Cir.), 69 Fed(2) 3, it was held that the right of an attorney to appeal from an order allowing a fee, was waived by the attorney's accepting and retaining fee allowed by the order, on the theory that *one accepting the benefits of a judgment or decree is estopped from thereafter reviewing it and escaping from its burdens.* In this particular case, Smith made an application for allowance of fee to a law firm and himself

jointly, and the Court allowed him separately a fee of $5,000.00 "as full and final compensation for his services as counsel for the Receivers". Mr. Smith accepted the $5,000 and thereafter appealed. The Receivers moved to dismiss the appeal, which was granted, and the Court, in passing on the matter, had this to say:

> "We think there are two other questions which stand out from the record, and that a ruling on one or the other takes precedence over all else. The first is:
>
> > Whether an attorney for a receiver has a right to appeal from a discretionary order of the court awarding attorney fees in the administration of an estate where no abuse of discretion is alleged?
>
> "We pass by that question (Stuart v. Boulware, 133 U.S. 78, 10 S.Ct. 242, 33 L.Ed. 568) and come to one *which is not debatable.* That question arises on the receivers' motion to dismiss the appeal and may be stated thus:
>
> "If there is in any case a right of appeal in a matter of fees, whether Mr. Smith has waived that right by accepting and retaining the fee allowed him by the order appealed from?
>
> "Actually, Mr. Smith is appealing from the whole order. Although it contains two paragraphs, one denying the allowance of joint fees, the other allowing Mr. Smith a separate fee, it is but one order, the two paragraphs being related and consistent one with the other. Mr. Smith is endeavoring to appeal from that part of the order which denied his contention that he is a joint solicitor with Richards, Layton and Finger, and, accordingly, denied him an allowance as such, while at the same time he is retaining the benefits of the order by which he, separately, was allowed, and

paid, $5,000, with the allowance distinctly marked 'as full and final compensation for his services.' In doing this, he is confronted by a rule of law, than which none is better settled, that one 'who accepts the benefits or any susbtantial part of the benefits of a judgment or decree is thereby estopped from reviewing and escaping from its burdens.' He cannot avail himself of its advantages, and then question its disadvantages in a higher court. (Citing cases.)

"Only recently this court had occasion to apply this rule in United Engineering & Foundry Co. v. Cold Metal Process Co., 68 Fed.(2) 564, where the trial court had held the patent sued upon valid yet dismissed the bill for infringement because of an outstanding and valid license held by the defendant thereunder. Holding on to that part of the decree which bestowed upon it the benefits of the license, the defendant, in substance, appealed from the other part of the decree which it did not like. The Court dismissed the appeal. While there was involved in that case a principle of patent law not involved in this case, the theory on which the appeal was dismissed is the same."

See, also:

Altman v. Shopping Center Bldg. Co., et al. (8 Cir.), 82 Fed.(2) 521 at 527;

Re Greenpoint Metallic Bed Co. Inc. (2 Cir.), 113 Fed.(2) 881, 884.

In *Kaiser v. Standard Oil Co. of New Jersey* (5 Cir.), 89 Fed.(2) 58, it was said, in holding that the accepting of fruits of judgment and thereafter appealing therefrom are totally inconsistent positions and that the election to pursue one course is deemed an abandonment of the others:

"Accepting the fruits of a judgment and thereafter appealing therefrom are totally inconsistent positions, and the election to pursue one course is deemed an abandonment of the other. What, if anything, was due libelant for maintenance and cure was a controverted question below. Libelant having accepted the benefits of that separable portion of the decree, he is estopped to now question it in that respect. He will not be heard to both approbate and reprobate as to the same matter."

See, also:

Albright, et al. v. Oyster, et al. (8 Cir.), 60 Fed. 644;

Oriole Phono. Co. v. Kansas City etc. (8 Cir.), 34 Fed.(2) 400, 401, second column.

In the *Oriole* case, *supra,* the question of payment of a definite sum due in any event, is discussed.

In *Shannon Copper Co. v. Potter,* 14 Ariz. 481, 131 Pac. 157, the Supreme Court of Arizona, in a case involving a settlement of a judgment, held:

"The law is well settled that a party cannot receive satisfaction of a judgment in his own favor and thereafter prosecute his appeal from the same judgment in the hope of obtaining a more satisfactory one. (Citing cases) * * * We think the settlement of the judgment extinguished all the matters in controversy between the parties to this appeal and leaves nothing for the decision of this court. * * * For the reasons stated, viz., that the judgment is admitted by appellant to have been settled since the trial of the cause, the appeal is dismissed."

See, also:

Denney v. Fort Recovery Banking Company (7 Cir.), 135 Fed.(2) 184, 186;

13 *Am. Dec.* 548;

In re Hamlin (4 Cir.), 40 Fed.(2) 852, 855.

In *Cyclopedia of Federal Procedure* (2nd Ed.), Volume 10, at page 503, can be found a statement concerning payment under a judgment or decree and the acceptance of benefits thereunder which states the exceptions, which exceptions are inapplicable here.

If one cannot appeal under the situation presented in this case, certainly he cannot, after the time for appeal has expired and after the lapse of fifteen (15) months thereafter, ask for a rehearing and a new award.

Appellee believes it to be clear that if appellant can recover in the present action, he must do so through a bill of review and not a motion for a rehearing. A motion for a rehearing is tantamount under the Rules of Civil Procedure to a motion for a new trial, and, being filed more than fifteen (15) months after the final appealable order of December 7th, 1942, is too late.

A bill of review is an independent action to correct a judgment and requires service of process as any other new action (*Zegura v. U. S.* (5 Cir.), 104 Fed.(2) 34; 19 *Am. Jur.*, page 291).

If this were a new action *brought in the state courts of Arizona,* appellant indubitably would be foreclosed because, having accepted the benefits of the final order of December 7th, 1942, and having retained same, he could not now prosecute his appeal from the same order in the

hope of obtaining a more satisfactory one. In short, the settlement of the order extinguished all matters in controversy between the parties to this appeal and leaves nothing for the decision of this Honorable Court.

Shannon Copper Company v. Potter, supra;
Nowland, et al. v. Vinyard, 43 Ariz. 27, 29 Pac. (2) 139, 141;
Frankel v. Frankel, 41 Ariz. 396, 18 Pac.(2) 911, 913;
Webb v. Crane Co.,[4] 52 Ariz. 299, 80 Pac.(2) 699, 708.

In short, the present action, if successful, would permit a recovery by the appellant in the Federal court which would be denied him in the state court, thereby defeating the purpose of Section 725, Title 28, U.S.C.A., sometimes known as the "State Law Conformity Act".[5]

The purpose of this Act, as stated in the unanimous opinion by Mr. Justice Stone (now Chief Justice) in *West v. American Telephone and Telegraph Company,* 311 U.S. 223, 61 S.Ct. 179, 85 L.Ed. 139, is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts and the other to be availed of in Federal courts only in case of diversity of citizenship; and in *Fidelity Union Trust Co., et al. v. Field,* 311 U.S. 169, 61 S.Ct. 176, former Chief Justice Hughes, in a unanimous opinion, reversed the Cir-

4. *The Crane Co.* case shows a distinction where payment is compulsory.

5. Section 725, Title 28, U.S.C.A., reads: "The laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

cuit Court of Appeals for the Third Circuit (108 Fed.(2) 521), the same result being reached. The Court, in that opinion, cited *Erie Railroad Company v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487, and *Ruhlin v. New York Life Ins. Co.,* 304 U.S. 202, 58 S.Ct. 860, 82 L.Ed. 1290. (Compare: *Sampson v. Channell* (1 Cir.), 110 Fed.(2) 754; 3 *Cyc. Fed. Proc.* (2d Ed.), Sec. 648, page 180, ex etc.; *Meredith, et al. v. City of Winter Haven,* 320 U.S. 228, 64 S.Ct. 7; *Peterson v. Chicago Great Western Ry. Co.* (8 Cir.), 138 Fed.(2) 304; *Moore, et al. v. McDuffie, et al.* (9 Cir.), 71 Fed.(2) 729; *Douglass, et al. v. Thurston County* (9 Cir.), 86 Fed.(2) 898; *Pierrepont v. Fidelity-Philadelphia Trust Co.* (DC Penn.), 32 Fed.(2) 608; *Palmer v. Hoffman,* 318 U.S. 109, 63 Sup. Ct. 477, 482.)

Appellant's right of recovery is a substantive matter and not a procedural one and hence is governed by the state law. It has been held by this Honorable Court that the burden of proof in a case is substantive (*New York Life Ins. Co. v. Rogers,* 126 Fed.(2) 784, 788; *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.,* 313 U.S. 487, 61 Sup.Ct. 1020).

In *Montgomery Ward & Co. v. Callahan* (10 Cir.), 127 Fed.(2) 32, it is held that the right to recover is a substantive right (page 36) and is therefore controlled by the laws of the state, citing the *Erie Railroad Company v. Tompkins* case, *supra.* In the *Montgomery Ward & Co.* case, *supra,* it was held that whether *an executed release could be set aside for mutual mistake must be determined by the state laws and decisions.*

In 36 *Corpus Juris,* Section 27, page 963, it is said, in differentiating between substantive and adjective law that

> "substantive law is that part of the law which creates, defines and regulates rights, as opposed to adjective or remedial law, which prescribes the method of enforcing rights or obtaining redress for their invasion."

See, also:

Green v. Term. R. Asso., etc., 135 S.W.(2) 652.

In *Waldron v. Aetna Casualty & Surety Co.* (3 Cir.), 141 Fed.(2) 230, 234, in holding that in diversity cases, party's substantive rights must be determined according to applicable local law, and that while questions of evidence relate to matters of procedure that the sufficiency of the evidence goes to the maintenance of the substantive right and is, therefore, to be tested by local law in cases where such law controls.

In equity receivership cases *depending on diversity of citizenship,* it appears that claims are allowable and assets are distributable according to the laws of the state.

Prudential Insurance Company of America v. Land Estates, Inc. (2 Cir.), 110 Fed.(2) 617;
3 *Cyc. Fed. Proc.* (2d Ed.), Section 613, page 100.

In *Biddle, et al. v. Cox Lime, Stone & Lime Products Corporation* (D.C. Penn.), 47 Fed. Supp. 570, it is held that in a Federal court equity receivership which is not a bankruptcy proceeding, the state law was controlling as to fixing a tax lien within the statutory period, citing *Erie Railroad Company v. Tompkins, supra.*

The Federal courts in diversity cases look to the state decisions to determine what is due on a judgment (3 *Cyc. Fed. Proc.* (2d Ed.), Section 618, page 107).

It will be seen from an examination of the authorities that the law to be applied by Federal courts in diversity cases is the law of the state except in matters governed by the Federal constitution, or by acts of Congress.

If the Conformity Act, which has been greatly broadened by the *Erie Railroad* case, *supra,* has any application here, and we believe it has, appellant is definitely foreclosed by virtue of the decision of the Supreme Court of Arizona in the *Shannon Copper Company* case, *supra.* He is definitely foreclosed under the "general law" by the decisions of the Federal and state courts, *supra.*

Appellant would be in no better position if, by virtue of the "conflict of law rule", the Utah decisions controlled. In Utah, it is definitely held that the general rule that a litigant is not permitted to accept the fruits of a judgment and still prosecute an appeal from it, governs.

Sierra Nevada Mill Co. v. Keith O'Brien Co., 48 Utah, 12, 156 Pac. 943, 946, 947;

Ottenheimer, et al. v. Mountain States Supply Co., 56 Utah 190, 188 Pac. 1117, 1118;

Moon v. Bollwinkle, et al., 47 Utah 389, 154 Pac. 939, 940.

No matter what else may be said, the fact that the appellant accepted the benefits of the order of December 7th, 1942, in the manner as shown by the record here, forecloses him, under all the authorities, from prosecuting an appeal from that order.

(e) A Bill of Review, or a Bill in the Nature of a Bill of Review, Will Not Lie in This Case Because Appellant, Having Accepted the Benefits of the Order of December 7, 1942, Is Now Estopped From Reviewing Same; He Cannot Accept Its Benefits and Escape From Its Burdens.

Subdivision (b) of the prayer of appellant's petition reads as follows:

> "That this Court, as in the nature of a bill of review, or by an original bill in equity, review said petition filed herein by petitioner on October 15, 1937, and said order entered herein on December 7, 1942, and upon such review that this Court correct the errors of law and fact apparent in said order, and thereupon allow and award to petitioner compensation in such amount as now appears from the entire record herein to be just and proper" (618).

Appellant is estopped from reviewing the order of December 7th, 1942, because, having accepted the benefits of the order, he is estopped from reviewing it or from escaping from its burdens.

Hill, et al. v. Phelps, et al. (8 Cir.), 101 Fed. 650, 654;

Albright v. Oyster (8 Cir.), 60 Fed. 644;

Chase v. Driver, 92 Fed. 780, 786;

Brigham City v. Toltec Ranch Co., 101 Fed. 85;

Home St. Ry. Co., et al. v. City of Lincoln (8 Cir.), 162 Fed. 133;

Central Hanover Bank, et al. v. Wardman etc., 31 Fed. Supp. 685, 688.

In *Hill, et al. v. Phelps, et al., supra,* the Circuit Court for the Eighth Circuit, speaking through Circuit Judge Sanborn, said:

"There is another reason why the decree in this case cannot be reviewed. It is that *the appellees have paid, and the appellants have accepted, the entire debt which the decree was rendered to enforce. One who accepts the benefits of a verdict, decree, or judgment is thereby estopped from reviewing it, or from escaping from its burdens.*"

This, of itself, is sufficient to dismiss a bill in equity to review the order or a bill in the nature of a bill of review.

(f) A Bill of Review for Errors Apparent on the Face of the Record Will Not Lie After the Time Allowed for Appeal Has Elapsed.

In *Peeke v. Citizens Bank Company etc.* (6 Cir.), 81 Fed.(2) 112, it is held that ordinarily bills of review must be filed within time limited for appeal where review sought is not founded on new evidence discovered since decree.

19 *Am. Jur.*, Sec. 444, page 306;
Thomas v. Brockenbrough, et al., 23 U.S. 146, 150.

In *Jorgenson v. Young* (9 Cir.), 136 Fed. 378, the Circuit Court for the Ninth Circuit, speaking through Circuit Judge Ross, said:

"We are of the opinion that the judgment of the court below was right, for several reasons. The judgment in the original suit was entered February 1, 1902; the bill of review was not filed until April 11, 1904—*long after the time for an appeal from that judgment had elapsed. The rule is well settled in courts of equity of the United States that a bill of review must ordinarily be filed within the time limited by statute for taking an appeal from the decree sought to be reviewed, where the review sought is*

not founded on matters discovered since the decree. (Citing cases) This bill is not founded on matters discovered since the original decree, for it shows upon its face that the complainant 'surmised', when the alleged false testimony was given, that it was not true. It shows, moreover, that the facts which the complainant contends show it to have been false were, in part, matters of public record, of which the complainant had at least constructive notice, and of which he might have had actual notice by going to the recorder's office of the district. 'The newly discovered evidence which may form the basis of such a review must be not only evidence which was not known, but also such as could not with reasonable diligence have been found, before the decree was made.' "

See, also:

Reed, et al. v. Stanley, et al. (9 Cir.), 97 Fed. 521;

Farmers & Merchants Bank v. Arizona M. & L. Ass'n (9 Cir.), 220 Fed. 1, 7;

Hagerott v. Adams (8 Cir.), 61 Fed.(2) 35, 36;

Blythe Co. v. Hinckley, et al. (9 Cir.), 111 Fed. 827, 837, 841;

Hendryx, et al. v. Perkins (1 Cir.), 114 Fed. 801, 804;

Chamberlin v. Peoria etc. (7 Cir.), 118 Fed. 32, 34;

Cocke, et al. v. Copenhaven, et al. (4 Cir.), 126 Fed. 145, 147;

In re Holmes, 142 Fed. 391, 393, 394;

In re Stearns & White Co., 295 Fed. 833, 839, 840;

Central Trust Co. v. The Grant Locomotive Works, etc., 135 U.S. 207, 227;

Taylor v. Easton, 180 Fed. 363;

Home St. Ry., et al. v. City of Lincoln (8 Cir.), 162 Fed. 133;

Cyc. Fed. Proc. (2d Ed.), Vol. 8, Sec. 3602, pages 350, 351.

(g) A Bill of Review, or a Bill in the Nature of a Bill of Review, Will Not Lie Where No Fraud Is Alleged, or Where There Is No Newly Discovered Evidence Claimed, Unless There Is Error Apparent on the Face of the Record.

Of course, in cases where a bill of review, or a bill in the nature of a bill of review, will lie, it is axiomatic that the decree or order must be final. Petitioner in his pleadings contends that the order of December 7th, 1942, *is not a final order.* If this be so (of course it is not), and if his petition be considered a bill of review or a bill in the nature of a bill of review, it should be instantly dismissed for that reason.

O'Brien's Manual of Federal Appellate Procedure (Third Edition, 1941), page 246;

First National Bank of Cincinnati, et al. v. Flershof, 290 U.S. 504; 54 Sup. Ct. 298; 90 A.L.R. 391.

In this latter case, Mr. Justice Brandeis, in delivering the opinion of the Court, held

> "that a bill of review is called for only after a final decree—one that finally adjudicates upon the entire merits, leaving nothing further to be done except the execution of it. (Citing John Simmons Co. vs. Grier Bros. Co., 258 U.S. 82, 88)."

In *Cyclopedia of Federal Procedure* (2nd Ed.), Volume 8, page 369, paragraph 3609, it is said by the author that,

> "The remedy (bill of review) is not available until the judgment in question has become final."

and apparently, as stated in the same section, that if the basis of the bill is not newly discovered evidence (and that is not claimed here), *the bill must be filed within the time to appeal;* and inasmuch as under Rule 60(b) a judgment may be set aside within six (6) months upon applicable grounds, *the remedy by bill of review for errors apparent on the face of the record is practically obsolete.*

It is well settled that a judicial decision which has been announced subsequent to the entry of the order or decree which changes the controlling rule of law is not the basis for a bill of review on the theory either that the decision constitutes new matter or that it demonstrates error apparent on the face of the decree.

19 *Am. Jur.,* page 298, par. 432;
30 *C.J.S.,* par. 646, page 1082;
Safeway Stores Inc. v. Coe etc., et al. (C.C.A. D.C.), 136 Fed.(2) 771, 773;
Wallace v. Franz (8 Cir.), 68 Fed.(2) 313, 314;
Miller etc. v. McCutcheon etc. (N.J.), 175 Atlantic 155; 95 A.L.R. 702, 708;
United States v. Haas (D.C. N.Y.), 58 Fed. Supp. 179.

In *Wallace v. Franz, supra,* it was held that litigation in another case resulting in a decree where it was shown that client received greater benefit from attorney's services, held not to present new matter or newly discovered evidence justifying bill of review to set aside decree fixing attorney's compensation.

Under the heading *"Vacation of Judgments—Bills of Review"*, there is a very good statement in Volume 8 of *Cyclopedia of Federal Procedure* (2nd Ed.), beginning on page 345, with a myriad of cases dealing with bills of review, and from a reading of the text, it indubitably appears that the appellant in the case at bar has misconceived his remedy, if any he now has. On page 348 of Volume 8, *Cyclopedia of Federal Procedure* (2nd Ed.), it is said:

> "Another distinction that was usually observed in equity practice prior to the adoption of the Rules of Civil Procedure was that between the application for rehearing and the bill of review. The application for rehearing was available during the term of rendition of the decree, but after expiration of the term application usually had to be by bill of review or independent suit to enjoin enforcement. Since, under the Rules of Civil Procedure, the term of court at which a judgment is entered no longer fixes the period of the court's primary control over the judgment, and *rehearing applications are placed upon the same basis as motions for new trial,* there is nothing to be gained by further pursuing distinctions, now of no moment, between rehearing applications and bills of review."

Of course, the time for a motion for a new trial or for a rehearing has long since passed. The time for filing a bill of review has also passed.

In *Hill, et al. v. Phelps* (8 Cir.), 101 Fed. 650, the Court quoted from the declaration by Lord Chancellor Bacon, in the first of his ordinances in chancery, the following:

> "No decree shall be reversed, altered, or explained, being once under the great seal, but upon bill of re-

view. And no bill of review shall be admitted, except it contain either error in law, appearing in the body of the decree, without further examination of matters in fact, or some new matter, which hath arisen in time after the decree, and not any new proof, which might have been used, when the decree was made. Nevertheless, *upon new proof, that is come to life after the decree was made, which could not possibly have been used at the time when the decree passed,* a bill of review may be grounded by the special license of the court, and not otherwise."

In *Fraser v. Doing* (C.C.A. DC.), 130 Fed.(2) 617, 620, the Court, in quoting from the Supreme Court of the United States, said:

"The Supreme Court has stated that:

'Bills of review are on two grounds: first, error of law apparent on the face of the record without further examination of matters of fact; second, new facts discovered since the decree, which should materially affect the decree and probably induce a different result.' A third ground, also, has been recognized, namely, fraud in procuring the decree. Appellant does not contend that there was fraud in the procuring of the decree or that any new matter of fact or evidence was discovered, after the entry of the decree, in Equity Cause No. 67317, which would probably induce a different result.

The only other issue which could have been presented to the District Court, in the present case, therefore, by bill of review or by complaint in the nature of a bill of review was whether there was error of law apparent upon the face of the record in Equity Cause No. 67317. Appellant has further defined that issue by his statement that: 'The genuine

issue in the case is whether the impeached decrees are valid, i.e., whether the Court which entered them possessed jurisdiction in personam over appellant.' ''

The appellant here cannot invoke either of these grounds —they are utterly lacking.

Whether order was right or wrong is no longer open to inquiry as time of appeal has passed and order was final in effect.

Concerning the order of December 7th, 1942, relating to the final allowance covering all services theretofore rendered by appellant "as set forth in his said petition (108-162) and as attorney for the former receiver", which appellant now claims was not in issue because not contained in the pleadings, appellee respectfully calls the Court's attention to a decision by the late Circuit Judge Gilbert in *Allen v. Allen, et al.,* 97 Fed. 525, 530, 531, in which it is held in effect that where a judgment is rendered on pleadings which presented no issue and might therefore be considered void, that if it was believed that the court erred in rendering such a judgment "the remedy was to have brought the matter before the appellate court on an appeal from the judgment".

Treinies, et al. v. Sunshine Mining Co., et al. (9 Cir.), 99 Fed.(2) 651, 655;

Roche v. McDonald, 275 U.S. 449, 454, 48 S.Ct. 142, 72 L.Ed. 365, 53 A.L.R. 1141;

Boundary County, Idaho, et al. v. Woldson (9 Cir.), 144 Fed.(2) 17, 19;

Wells Fargo & Co. v. City and County of San Francisco (Calif.), 152 P.(2) 625, 628.

(h) The Time for Considering a Judgment or Order That Has Become Final Cannot Be Extended Unless a Motion to Review, Rehear, Modify, Revise or Vacate Such Order Has Been Seasonably Filed and That An Unseasonably Filed Motion or Petition, Although It May Be Considered on Its Merits, Cannot Have the Effect of Extending the Time to Appeal From the Original Order or Judgment.

(i) A Motion for Rehearing or a Motion for a New Trial Must Be Filed Seasonably and Within the Time Provided by the Rules of Civil Procedure.

Irrespective of what counsel says, we believe it ridiculous to contend that after an order has become final and after the beneficiary of that order had accepted its fruits, that he can thereafter, by an out of time petition or motion, have that order reviewed, reheard, modified or revised, where no appeal had been taken within the time required by law. We believe there is no question but that where a petition such as this is filed for a rehearing, and denied, after the expiration of the period for appeal, the right to appeal cannot be revived. In the well considered case of *Safeway Stores Inc. v. Coe, etc., et al.* (C.C.A. D.C.), 136 Fed.(2) 771; 148 A.L.R. 782, note 795, the Court held that the time for taking an appeal is suspended by a *seasonably* filed motion for a new trial or a petition for a rehearing; but not an *unseasonably* filed motion or petition, although such motion or petition is considered on its merits. It appears in the *Coe* case that the complaint was dismissed on October 17th, 1941, and that on November 17th, 1941, Safeway Stores filed a motion for a rehearing, *which was considered* and denied on January 17th, 1942; on February 14th, 1942, Safeway Stores gave notice of appeal to the Circuit Court of Appeals for the District of

Columbia. Thereafter and on July 6th, 1942, the appellee filed a motion to dismiss the appeal on the grounds that the order of January 17th, 1942, was not appealable, and on the further ground that the time for taking an appeal from the order of October 17th, 1941, had expired. After discussing Rules 59 and 60 of the Federal Rules of Civil Procedure and stating that the order entered was a final and appealable order and a complete and definite disposition of the cause before the Court, the Court dismissed the appeal. In this case the Court discussed quite fully Rules 6, 59 and 60.

See, also:

Jusino, et al. v. Morales, etc. (1 Cir.), 139 Fed.(2) 946;

4 *Cyc. Fed. Proc.* (2nd ed.), page 310.

In the *Coe* case, *supra,* the cases of *Bowman v. Loperena,* 311 U.S. 262, 61 S.Ct. 201, *Pfister v. Northern Illinois Finance Corp.,* 317 U.S. 144, 63 S.Ct. 133, and *Wayne United Gas Co. v. Owens-Illinois Co.,* 300 U.S. 131, 57 S.Ct. 382, relied upon by appellant here, were thoroughly discussed and distinguished.

In the *Jusino* case, *supra,* the Circuit Court for the First Circuit, in considering a motion to reconsider and vacate a judgment which was entertained by the court below, distinguished the case of *Pfister v. Northern Illinois Finance Corp., supra,* and held that the appeal should be dismissed for lack of jurisdiction because not taken within the three (3) months' period allowed after the entry of judgment (28 U.S.C.A., Section 230), and called attention to the fact that while the motion for reconsider-

ation was filed and entertained by the court well within the period allowed for taking the appeal, it was not filed within the time provided by the Rules of Civil Procedure.

See, also:

Nachod & United States Signal Co., Inc., et al. v. Automatic Signal Corporation, et al. (D.C. Conn.), 32 Fed. Supp. 588;

Nachod & United States Signal Co., Inc., et al. v. Automatic Signal Corporation, et al. (D.C. Conn.), 26 Fed. Supp. 418.

In *Hill v. Hawes,* 64 Sup. Ct. 334, 149 A.L.R. 736, the Supreme Court of the United States reversed a judgment because, while the appeal was taken too late after the judgment could be considered entered, it was not considered properly entered because the Clerk failed to send notice of entry as provided by Rule 77(d) and in the manner specified by Rule 5 of the Federal Rules of Civil Procedure, and in that case held that a judgment does not become final for the purpose of starting the running of the period of appeal until notice is sent by the Clerk in accordance with the rule. Appended to the case of *Hill v. Hawes, supra,* in 149 A.L.R., there is a note, beginning on page 740, which has to do with the power of trial courts in an indirect manner of any kind extending the time for taking an appeal, particularly after the time for taking the appeal has already elapsed, so as to evade an express statutory requirement that the appeal must be taken within a certain time. In that note are cited many cases from the United States courts and from the state courts. (See, also; Note 89, A.L.R. 941; *Leishman v. Associated Wholesale Electric Co.,* 318 U.S. 203, Sup. Ct. 543.)

Rule 6, subdivision (b), provides for enlargement of time in certain cases, i.e. (1) with or without motion or notice, order that period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order. This can have no application because the petition was not filed within time. However, under (2), upon motion, the Court may permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect; but the Court may not enlarge the period for taking any action under Rule 59 except as stated in subdivision (c) thereof, *or the period for taking an appeal as provided by law.*

Adverting to Rule 59, subdivision (b) provides that a motion for new trial shall be served *not later than ten days after the entry of the judgment,* except that a motion for a new trial on the ground of newly discovered evidence may be made after the expiration of such ten day period *but before the expiration of the time for appeal.* Subdivision (c) of Rule 59, which is excepted in subdivision (b) of Rule 6, is inapplicable here.

Rule 60 is inapplicable because the motion was not made within six months after the order of December 7th, 1942, but irrespective of that, a motion under Subdivision (b) of Rule 60 does not affect the finality of a judgment. The portion of subdivision (b) of Rule 60, which does not limit the power of the court to entertain an action to relieve a party from a judgment or order is likewise inapplicable for the reasons stated in the *Coe* case, *supra.* It must be borne in mind that a petition for a rehearing under the Rules is in all respects the same as a motion for a new

trial and, as stated in that case, the purpose of Rule 6(b), which forbids the court to enlarge time for taking any action under Rule 59 regarding a new trial, was to divest the court of jurisdiction to entertain a motion for a new trial or a motion for a rehearing *filed out of time.* It also must be borne in mind that under former Equity Rule 69, rehearings were granted only upon such grounds as would authorize a new trial in an action at law. If the appellant's petition had been filed in time, the time for appeal might have been extended three (3) months after the disposition of the petition, but not otherwise. If the petition here had been granted, it would be tantamount to indirectly extending the time to appeal, which we do not think the court below had jurisdiction to do (*Paul v. Paul,* 28 Ariz. 598, 604, 238 Pac. 399).

As to relation of Rule 6(b) to Rule 60(b) on motion to vacate judgment, see 4 *Cyc. Fed. Proc.* (2nd Ed.), page 310.

By not appealing within the three months' period the petitioner lost his right to appeal (*DeJordan v. Hudspeth, etc.* (10 Cir.), 137 Fed.(2) 943).

In Arizona it is held that the common law doctrine that a court may set aside or modify a judgment is effective but it must be done within 6 months as provided by statute.[6]

6. *In re Ralph,* 49 Ariz. 391, 67 Pac.(2) 230; *Swisshelm Gold Silver Co. v. Farwell,* 59 Ariz. 162, 124 Pac.(2) 544; *Collister v. Inter-State B. & L. Assn.,* 44 Ariz. 427, 38 Pac.(2) 626, 98 A.L.R. 1020.

(j) Lack of Diligence in Filing Petition.

A delay from December 7, 1942, to March 31, 1944 (15 months), in filing a bill of review showed a lack of due diligence which barred review of order appealed from.

> "Assuming, without deciding, that a bill of review is the proper remedy for the relief sought, the court is of the opinion that, under the circumstances in this case, the delay in filing it, from May 18, 1938, to March 18, 1940, showed a lack of due diligence." (*Price v. National Surety Corporation of New York* (6 Cir.), 127 Fed.(2) 726.)

(k) The Failure of the Court to Find the Facts Specially and State Separately Its Conclusion of Law Thereon as Provided by Rule 52 Does Not Make the Judgment Void.

In *Monaghan v. Hill,* 140 Fed.(2) 33, 34, this Court, in a similar case, held that there was no error to call to the attention of the trial court under Rule 46 of the Rules of Civil Procedure because all of the evidence was presented by petitioners (including appellant) with no intervening exceptions, *except that the sum awarded was insufficient and that the court knew from the petition that petitioners though they were entitled to more than the amount of the judgment he awarded.*

In the instant case, the Court generally found that a reasonable compensation to the attorneys for their services rendered is $25,000.00, and that one-half of such amount was sufficient for the petitioner here. The Court further found that the sum of $7,344.00, covering salary and expenses of the petitioner here, was sufficient compensation as one of the attorneys for the former Receiver. In the order, the amount fixed for the petitioner Nealon was $12,500.00, less the sum already paid. Apparently,

there is no disputed question of fact and hence special findings and conclusions would be unnecessary. It must be remembered that the purpose of findings of fact is to enable appellate courts to ascertain the basis for the determination below and that where the appellate court can readily understand the questions presented, precise findings are not essential on all material issues, although they may be helpful. It must be remembered that this Circuit Court in the *Monaghan* case, *supra,* did not think that findings were essential because the only issue was the amount of the judgment. (See top of page 34, 140 Fed(2).)

It seems that the question of the necessity for special findings has arisen a number of times in cases where an involuntary dismissal at the close of the plaintiff's case is granted pursuant to Rule 41(b). Since, on such a motion, the facts are not in issue, it would seem that there is no necessity for findings. In *Thomas v. Peyser,* 118 Fed.(2) 369, the Court of Appeals for the District of Columbia held as follows:

> "There is no merit in appellants' contention that the trial court should have made findings of fact. Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following Section 723c, requires findings 'in all actions *tried upon the facts*' (italics supplied). This case was not tried upon the facts. The facts were admitted by the motion to dismiss. Obviously there need be no fact findings where the facts were not in issue. The only issues determined by the trial court were questions of law and these adequately disposed of the case."

Even if the facts were contested, it would seem that where the petitioner knew of the judgment and accepted

the fruits thereof without any complaint as to lack of special findings and without any complaint as to the judgment until some fifteen (15) months after its entry, he should not now be in position to complain. *At all events, findings or no findings, the judgment should have been appealed from within the time provided by statute, as it was final under the law.*

It is certain that if the *Monaghan* case, *supra,* had arrived in the Circuit Court of Appeals without findings, the result would have been the same, because, as stated by that Court:

> "There was no error to call to the attention of the trial court * * * except that the sum awarded was insufficient, and the Court knew from the petitions that petitioners thought they were entitled to more than the amount of the judgment he awarded."

In *Hurwitz v. Hurwitz* (C.C.A. D.C.), 136 Fed.(2) 796, 799, the Court said:

> "* * * Their purpose is to aid appellate courts in reviewing the decision below. In cases where the record is so clear that the court does not need the aid of findings it may waive such a defect on the ground that the error is not substantial in the particular case. That is the situation here. The trial court's charge to the jury discloses adequately the issues of fact which were before the court and jury, and upon a review of the evidence we would reach the same result as that reached by the jury. Therefore, it is immaterial whether the cause below was in equity or at law. In either case a judgment following the verdict of the jury should be sustained."

See, also:

Stoltz v. U. S. (9 Cir.), 90 Fed.(2) 283, 284;
Jackson Co. v. Alton, etc. (8 Cir.), 105 Fed.(2) 633;
Goodacre v. Panagopoulos (C.C.A. D.C.), 110 Fed. (2) 713;
Mass. Bonding & Insurance Co. v. Preferred Auto. Insurance Co. (6 Cir.), 110 Fed.(2) 764;
Girard Trust Company v. Amsterdam, et al. (5 Cir.), 128 Fed.(2) 376.

In 4 *Corpus Juris Segundum,* at page 827, the author states that a motion for a new trial is often regarded as prerequisite to review the trial court's failure to make findings of fact or conclusions of law and that an objection based on the refusal or failure of the court to make findings of fact or conclusions of law, even in the case of a refusal of a special request for findings or the failure to make any findings, may be disregarded on appeal unless presented to the trial court by a motion for a new trial or in some other way in accordance with applicable practice.

See, also, in this connection:

3 *Corpus Juris,* page 984, Paragraph 902;
U. S. v. Mitchell (8 Cir.), 104 Fed(2) 343.

Of course, we realize that the Circuit Courts have at various times sent cases back for special findings but this is because the appellate court could not readily grasp the situation presented without findings. Such is not the case here, because the only question is "was the fee awarded sufficient?", and no complaint has been made on that score until now. Petitioner now claims he got too little and we

claim he is too late. In any event, no appeal was taken, and he, until now, concurred in the order by accepting the benefits thereof.

CONCLUSION

Appellee believes that he has pointed out that a motion for a new trial, rehearing, or to vacate or modify the order of December 7th, 1942, is too late.

Appellant seeks to review that order by a petition to review and rehear same and asks the lower court to vacate same for want of jurisdiction of the court to render said order and asks the court to enter a supplemental order allowing and awarding appellant compensation *"in such amount as now appears from the entire record herein to be right and proper"* (618). He also asks the court to review the order to "correct the errors of law and fact *apparent* in said order". Appellee has shown that this cannot be done because there is no error apparent in said order and furthermore the petition is too late. Appellee has pointed out, *supra,* that a change in the law by a later decision avails appellant nothing. He has accepted the full benefits of the order with full knowledge of its portent. No matter whether the court is bound by the Arizona or Utah decisions or by "general law", the ultimate result must be the same.

Appellant does not claim newly discovered evidence. He relies on newly discovered law, i.e., the *Monaghan* case, *supra.* He does not rely on fraud, and under the record here, no one in his sound senses could claim fraud. If after-discovered fraud were shown, he could have equitable relief against a fraudulent order irrespective of the

fact that 15 months had elapsed between the date of the final order and the time appellant's petition was filed (*Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S.Ct. 997).

Appellant has cited three (3) fairly late decisions by the Supreme Court of the United States, i.e., *Bowman v. Lopereno, Pfister v. Northern Illinois Co.*, and *Wayne United Gas Co. v. Owens-Illinois Co., supra.*

These last mentioned cases, one of which was from this Court, all relate to bankruptcy and are distinguishable from the case at bar. This is pointed out in *Safeway Stores Inc. v. Co., etc., et al., supra,* and in the note to that case in 148 A.L.R., beginning on page 795. The distinguishing features of the three (3) bankruptcy cases, *supra,* are carefully pointed out by Chief Justice Groner in the *Coe* case, *supra.*

Other cases relied upon by appellant are not controlling here because, in view of the record, they are clearly distinguishable.

It is respectfully submitted that the attempted appeal by appellant should be dismissed and in all events the order of the court below denying and dismissing the petition should be affirmed.

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No. 10961

United States
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For the Ninth Circuit

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Appellant,

v.

HARRY W. HILL, as Receiver of Intermountain Building & Loan Association, a corporation,

Appellee.

Reply Brief of Appellant

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STATUTES

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No. 10961

United States
Circuit Court of Appeals
For the Ninth Circuit

THOMAS W. NEALON,

Appellant,

v.

HARRY W. HILL, as Receiver of Intermountain Building & Loan Association, a corporation,

Appellee.

Reply Brief of Appellant

Counsel for the receiver, as appellee herein, have arranged their reply brief into subdivisions with headnotes (a) to (k). Uniformity suggests that counsel for appellant conform to the same arrangement and, accordingly, each subheading of appellee's brief will be restated by counsel for appellant in their alphabetical order and will be replied to in that order.

(a) *An Order or Decree Which Adjudges that an Attorney Is Entitled to Compensation in a Definite Amount and Allows a Lien Therefor on a Fund in Court, and Directs*

Payment, is a Final Order and Appealable although No Final Disposition Is Made of the Residue of the Fund.

Appellant has not asserted that the order entered December 7, 1942 (R. 243) was not a final order from which an appeal would lie. The discussion of that question is now academic.

Monaghan v. Hill (9 Cir.) 140 Fed (2) 31.

(b) *Appellant in His Attempted Appeal from the Order of December 7, 1942, Is Too Late, as an Appeal from Such an Order Must be Taken Within Three (3) Months from the Entry Thereof.*

The trial court examined and disposed of the petition filed March 31, 1944 to rehear the order of December 7, 1942. In such circumstances, the order of December 7, 1942 was appealable.

Bowman v. Lopereno, 311 U. S. 262, 61 S. Ct. 201, 85 L. Ed. 177.

Wayne United Gas Co. v. Owens-Illinois Co., 300 U. S. 131, 81 L. Ed. 557, 57 S. Ct. 382.

Pfister v. Northern Illinois Finance Corp., 317 U. S. 144, 87 L. Ed. 146, 63 S. Ct. 133.

(c) *The Order of November 29, 1944, Is Not a Final Decision Within the Meaning of Section 128 (a) of the Judicial Code, 28 U. S. C. A., Section 225 (a) and Is Not Appealable.*

The reply to subdivision (b) is applicable to this subdivision (c). Both orders are now appealable.

(d) *An Attorney Accepting the Benefits of a Final Order or Judgment and Retaining the Fee Allowed Thereby, Cannot Thereafter Appeal Therefrom.*

Appellant concedes that he accepted the check which was delivered to him by the receiver under the order entered December 7, 1942. Appellant contends that the acceptance of the check does not, on the record, deprive him of the right to appeal from the order of December 7, 1942 in an administrative proceeding in equity not closed. Appelant's contention in this respect is discussed in his opening brief, beginning at page 34. The substance of that argument is that one who accepts the benefits of an order, which confessedly he was entitled to receive in all events, does not estop one from claiming more when justly due. Appellant cited, among other cases, the following:

Embry v. Palmer, 107 U. S. 3, 2 S. Ct. 25, 27 L. Ed. 346;

Reynes v. Dumont, 130 U. S. 354, 9 S. Ct. 486, 32 L. Ed. 934;

Erwin v. Lowry, 7 How. (48 U. S.) 172, 184, 12 L. Ed. 655.

In addition, appellant invoked the rule, as announced by this Court, that when a court of equity appoints receivers, the allowances to their attorneys, being purely administrative, are subject to increase or decrease with the development of the administration.

Drilling & Exploration Corporation v. Webster, (9 Cir.) 69 Fed. (2) 416.

It seems significant that the foregoing decisions are not referred to by appellee, or distinguished in their application to this record on appeal.

Appellee invokes the Rule of Decisions Statute, R. S. §721, §725, Title 28, USCA.[1]

That stuatute applies to state decisions as well as to state statutes.

> *Russell v. Todd,* 309 U. S. 280, 60 S. Ct. 527, 84 L. Ed. 754.

But as recent as December 2, 1944 this Court has held that the conformity required of federal courts to state rules is "as near as may be" and was not intended to tie their hands when in their judgment it would "unwisely encumber the administration of the law, or tend to defeat the ends of justice, in their tribunals."

> *Murphy v. United States District Court, etc.* (9 Cir.) 145 Fed. (2d) 1018, 1019, 1020.

Notwithstanding, appellee argues the rule of decision in Arizona is that a party cannot accept the benefits of a judgment, order or decree and afterwards prosecute an appeal to review the same and cites:

> *Shannon Copper Co. v. Potter,* 14 Ariz. 481, 131 Pac. 157.

Subsequently, appellee cites to the same effect the following:

[1]The statute reads: "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Nowland et al v. Vinyard, 43 Ariz. 27, 29 Pac. (2) 139, 141;

Frankel v. Frankel, 41 Ariz. 396, 18 Pac. (2) 911, 913;

Webb v. Crane Co. 52 Ariz. 299, 80 Pac. (2) 698, 708.

The *Shannon Copper Company* case was an action at law, not an administrative proceeding in equity, for debt upon a single complaint in two counts. Judgment was entered upon a verdict returned only for part of one of the counts sued upon. Plaintiff, as judgment creditor, settled the amount of the judgment and appealed. The Supreme Court of Arizona held that the satisfaction of the judgment deprived the appellant from appealing in the hope of obtaining a more satisfactory judgment.

Here, we are treating with an administrative proceeding in equity not closed, which, as we have shown, in the opening brief, does not fall in the same category as an action at law, but is placed under the continuing control of the court so that orders in such equitable proceedings, although termed final orders, may be reexamined out of time.

Nowland et al v. Vinyard, supra, apparently is an incorrect citation. It does not treat upon the question involved.

Frankel v. Frankel, supra, was a divorce action and holds that the wife, who was without funds to prosecute an appeal, requested permission to accept funds deposited with the clerk as a result of the judgment. The trial court granted her request and the Supreme Court of Arizona held that by accepting the funds she had not waived her right to appeal.

Assuredly, that decision cannot help appellee's position because here, as appellant has shown in his opening brief, beginning at page 22, he reserved the right to claim an additional allowance for services performed in the creditors' suit, had not then claimed allowance for services performed on behalf of the receiver, and for services performed in the ancillary receiverships, and stated that a payment of $12,500 "will help an attorney to get along, especially after he has been out of money, as I have been in this case." (Opening brief, p. 25, R. 371).

Webb v. Crane, supra, has no application. There it appears that the judgment debtor satisfied the judgment and appealed. The decision, although it does not say so (80 Pac. (2)707-708) imports that the judgment debtor, as appellant, satisfied the judgment in order to prevent the seizure and sale of his property, and under such circumstances, estoppel did not arise so as to prevent appeal.

If we are seeking an applicable rule of decision of the Supreme Court of Arizona which this Court is required to invoke and follow, then we should look for a decision that fits into a proceeding founded in equity.

We cite: *Moore v. Meyers,* 31 Ariz. 519, 255 Pac. 164.[2]

The facts of that case disclose a contract for the purchase of real estate through an agent upon which the purchasers deposited with the agent $200.00 as earnest money. The transaction failed, and the action was for damages founded upon fraud in which defendants pleaded estoppel, asserting that plain-

[2]The decision cited was on rehearing. The original decision appears at 31 Ariz. 347, 253 Pac. 626. The action was founded upon fraud and estoppel, subjects of equity jurisprudence.

tiffs had accepted $100.00 as their one-half share of the purchase money which had been paid to the agent.

The Supreme Court of Arizona, by the opinion on rehearing, held that the acceptance of the fund did not create estoppel and said:

> "It is the rule of law that no estoppel arises by the acceptance of benefits when the person claiming the estoppel has not been injured. 21 C. J. 1137. If plaintiffs only accepted money which they were entitled to under any circumstances, defendants were not injured thereby, and no estoppel existed. *Hays v. Heidelberg,* 9 Pa. 203. Plaintiffs were therefore entitled to go to the jury on the whole case under proper instructions."

The decision of the Supreme Court of Arizona does not cite *Embry v. Palmer, Reynes V. Dumont, Erwin v. Lowry,* supra, invoked by appellant on page 37 of the opening brief. Nevertheless, the decision of the Supreme Court of Arizona and the decisions of the Supreme Court of the United States reach identical conclusions.

It is axiomatic that estoppel does not arise by the acceptance of the benefits of the judgment when the person claiming estoppel has not been injured.

Glendale v. Coquat, 46 Ariz. 478, 52 Pac. (2) 1178.

In re Bastanchury Corp. (9 Cir.) 66 Fed. (2) 653, 657.

Homer Fritch Inc. v. U. S. (9 Cir.) 234 Fed. 608.

Lebold v. Inland Steel Co. (7 Cir.) 125 Fed. (2) 369, 375.

Pomeroy Equity Jurisprudence, Vol. 3 (5th ed.) Sec. 805.

The receiver will not be injured by the payment of funds to appellant to which appellant is rightfully entitled. These funds do not belong to the receiver, but they are funds in his custody which are rightfully chargeable against the petitioning creditors, individually, and as a class, for whom appellant sued and who have accepted the benefits of the suit. In fact the unconscionable order of the trial court of December 7, 1942 enriched the receivership estate at the expense of appellant. Thus, it is appellant who in reality has been harmed and consequently it is not inappropriate to say that it is he who is rightfully entitled to invoke estoppel against the receiver from claiming a fund which does not rightfully belong to him, but on the other hand, in good conscience, belongs to appellant.

So, in the application of the substantive law of Arizona, measured by the decisions of the Supreme Court of Arizona, the position of appellant is eminently better; but, if it were not, federal courts in proceedings in equity apply the substantive law of the state only as it may be correlated with equitable remedies in the application of which federal courts are uncontrolled.

Dodge v. Tulleys, 144 U. S. 451, 456, 457, 12 S. Ct. 728, 36 L. Ed. 501;

Black & Yates v. Mahogany Ass'n., 129 F. (2d) 227, 223;

Mercantile-Commerce Bank & Trust Co. et al v. Southeast Arkansas Levee Dist. et al, 106 Fed. (2) 966, 970, 971.

In *Dodge v. Tulleys,* supra, the Supreme Court, in an authoritative decision, had occasion to ascertain whether or not the law of Nebraska, statutory and decisional, disallowing attorneys' fees provided for in a written instrument, deprived the federal courts of the right to fix attorneys' fees, and said:

"* * * There is a stipulation in the trust-deed for the payment of an attorney's fee of $1,000, in case of foreclosure, but such stipulations have been held by the supreme court of Nebraska to be unauthorized. Dow v. Updike, 11 Neb. 95, 7 N. W. 857; Hardy v. Miller, 11 Neb. 395, 9 N. W. 475. It seems that in 1873 an act passed the legislature of Nebraska, expressly authorizing, in any written instrument for the payment of money, a stipulation for not exceeding 10 per cent. as an attorney's fee in case of suit. Gen. St. Neb. p. 98. This act was repealed in 1879. Laws Neb. 1879, p. 78. In the cases cited, the supreme court of the state held that by the repeal of the statute the contract right to recover attorney's fees was taken away. So, as this court follows the decisions of the highest court of the state in such matters (Bendy v. Townsend, 109 U. S. 665, 3 S. Ct. 482 (27 L. Ed. 1065), the provision in the trust deed for the payment of $1,000 as attorney's fees cannot be regarded as of binding force. But, while contract rights are settled by the law of the state, that law does not determine the procedure of courts of the United States sitting as courts of equity, or the costs which are taxable there, or control the discretion exercised in matters of allowances. Those courts acquire their jurisdiction and powers from another source than the state. There is no statute of Nebraska in respect to the matter. Even if there were one expressly prohibiting courts of equity from making allowances to trustees or their counsel, such prohibition would not control the proceedings in fed-

eral equity courts. They proceed according to the general rules of equity, except so far as such rules are changed by the legislation of congress; and while they may enforce special equitable rights of parties given by state statutes (Hollard v. Challen, 110 U. S. 15, 3 S. Ct. 495, 28 L. Ed. 52), yet their general powers as courts of equity are not determined and cannot be cut off by any state legislation. It is the general rule of equity that a trustee called upon to discharge any duties in the administering of his trust is entitled to compensation therefor, and including therein is a reasonable allowance for counsel fees. * * *"

(e) *A Bill of Review, or a Bill in the Nature of a Bill of Review, Will not Lie in this Case because Appellant, Having Accepted the Benefits of the Order of December 7, 1942, is Now Estopped from Reviewing Same; He Cannot Accept Its Benefits and Escape from Its Burdens.*

The contention of appellant under this subdivision of his brief is a continuation of the argument under subdivision (d). The acceptance by appellee, as receiver, of funds to which appellant was disallowed, through error, is an unjust enrichment of the receivership estate.

(f) *A Bill of Review for Errors Apparent on the Face of the Record Will Not Lie after the Time Allowed for Appeal Has Elapsed.*

The petition filed by appellant on March 31, 1944 (R. 599) requested the court to review and rehear the order entered December 7, 1942.

The prayer of the petition (R. 617, 618) is not limited to a particular remedy for the correction of the order entered December 7, 1942. On the other

hand, the trial court was requested to vacate the order of the trial court; to review the order as in the nature of a bill of review or an original bill in equity; to grant a rehearing of the order; and to modify and review the order. Each was directed to a request to correct the order of December 7, 1942. Lastly, appellant prayed for such other and further relief as may appear just and equitable.

The court entertained the petition filed March 31, 1944, and, after answer was filed, ordered a pretrial conference thereon; entered an order approving the issues there formulated; came to a decision, and denied the petition filed March 31, 1944. Thus, the order entered December 7, 1942 was opened and reexamined. Consequently the order of December 7, 1942 was placed under review as disclosed on pages 13 to 16 of appellant's opening brief.

(g) *A Bill of Review, or a Bill in the Nature of a Bill of Review, Will not Lie Where No Fraud Is Alleged, or Where There Is No Newly Discovered Evidence Claimed, Unless There is Error Apparent on the Face of the Record.*

The concession by all parties that the order entered December 7, 1942 is a final order avoids discussing the question of its appealibility. That it was a final appealable order is now settled.

Monaghan v. Hill, (9 Cir.) 140 Fed. (2d) 31.

The question with respect to the decision of this Court in *Monaghan v. Hill,* supra, changing the rule of law as a basis for correcting the order of December 7, 1942 in its application to appellant is not involved.

At the time appellant's petition came on for hearing he then requested only the amount he was awarded. He received that amount, less the amount which had theretofore been paid to him, and then reserved the right to claim more. At the time the order of December 7, 1942 was entered, appellant had not claimed compensation for the extensive services rendered to the receiver, and compensation for services rendered in the ancillary receiverships.

Appellant invokes the familiar rule that orders of a trial court, awarding compensation to attorneys for services performed in receivership matters, are under the continuing control of a trial court, especially where reservation was made to claim additional compensation. This question has been treated in the opening brief of appellant at pages 28 to 34.

(h) *The Time for Considering a Judgment or Order that Has Become Final Cannot Be Extended Unless a Motion to Review, Rehear, Modify, Revise or Vacate Such Order Has Been Seasonably Filed and That an Unseasonably Filed Motion or Petition, Although It May Be Considered On Its Merits, Cannot Have the Effect of Extending the Time to Appeal from the Original Order or Judgment.*

(i) *A Motion for Rehearing or a Motion for a New Trial Must Be Filed Seasonably and Within the Time Provided by the Rules of Civil Procedure.*

The burden of the argument under these subdivisions of appellee's brief is directed to the contention that *Bowman v. Lopereno,* 311 U. S. 262, 85 L. Ed. 177, 61 S. Ct. 201; *Pfister v. Northern Illinois Co.,* 317 U. S. 144, 87 L. Ed. 146, 63 S. Ct. 133; and *Wayne United Gas Co. v. Owens-Illinois Glass Co.,*

300 U. S. 131, 81 L. Ed. 557, 57 S. Ct. 382, do not accord appellant the right of appeal from the order of December 7, 1942.

In support of the contention that the decisions of the Supreme Court last cited are inapplicable, counsel for appellee cite:

> *Safeway Stores, Inc. v. Coe, etc. et al* (CCA DC), 136 Fed. (2d) 771, 773;
>
> *Jusino et al v. Morales, etc.* (1 Cir.) 139 Fed. (2d) 946.

In the *Safeway Stores* decision injunction was sought against Coe, Commissioner of Patents, and another, seeking to enjoin the registration of a trademark. The Commissioner moved to dismiss, which was sustained October 17, 1941. On November 17, 1941 Safeway Stores filed a motion for rehearing which was denied January 17, 1942. On February 14, 1942 Safeway Stores appealed from that order and not from the order of October 17, 1941, dismissing the complaint. The Commissioner filed a motion to dismiss the appeal on the grounds that the order of January 17, 1942 was not appealable, and that the time for appealing from the original order had run. Here appellant has appealed both from the order entered December 7, 1942 and from the order denying appellant's petition for rehearing of that order entered November 29, 1944. (R. 666).

Safeway Stores invoked *Bowman v. Lopereno, Pfister v. Northern Illinois Co.* and *Wayne United Gas Co. v. Owens-Illinois Glass Co.,* supra. Those decisions would not have supported Safeway Stores' appeal because no appeal was taken from the original order dismissing the complaint. The Court of Appeals for the District of Columbia thought these de-

cisions did not apply because each involved suits in bankruptcy. At 136 Fed. (2d) 744, the court said:

> "* * * both the Loperena and Pfister cases were suits in bankruptcy, and the statements of the court were based, we think, on the distinctive nature of bankruptcy proceedings. This conclusion is supported by Wayne U. Gas Co. v. Owens, 300 U. S. 131, 136, 57 S. Ct. 382, 385, 81 L. Ed. 557, which applied a similar rule and upon which both later cases relied. That, too, was a bankruptcy case in which an untimely petition for rehearing was considered on its merits."

Associate Justice Miller dissented (136 Fed. (2d) 776).

We think, upon independent examination by this Court of the question here involved, that it will be ascertained that the rule of procedure announced by the Supreme Court in the *Lopereno, Pfister* and *Wayne* cases is derived from equity jurisprudence rather than from bankruptcy, and that the rule applied by the Supreme Court in those decisions to proceedings in bankruptcy is a rule of equity which bankruptcy has appropriated. The true rule is found in the authoritative decisions of the Supreme Court as exemplified by:

> *Local Loan Company v. Hunt,* 292 U. S. 234, 54 S. Ct. 695, 78 L. Ed. 1230.

In speaking of the essential nature of courts of bankruptcy, the Supreme Court in the case last cited said:

> "Courts of bankruptcy are constituted by sections 1 and 2 of the Bankruptcy Act, amended by Act May 27, 1926 (U.S.C., title 11, § § 1 and 11 (11 USCA § § 1, 11), and are invested 'with

such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings,' etc. The words 'at law' were probably inserted to meet clause (4) of section 2, 11 USCA § 11(4), which empowers such courts to arraign, try, and punish certain designated persons for violations of the act. Bardes v. Hawarden Bank, 178 U. S. 524, 534-536, 20 S. Ct. 1000, 44 L. Ed. 1175. But otherwise courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity. Bardes v. Hawarden Bank, supra, 535 of 178 U. S., 20 S. Ct. 1000; In re Rochford (C. C.A.) 124 F. 182, 187; In re Siegel-Hillman Dry Goods Co. (D.C.) 111 F. 980, 983; Swarts v. Siegel (C.C.A.) 117 F. 13, 16; Dodge v. Norlin (C.C.A.) 133 F. 363, 368, 369; In re Swofford Bros. Dry Goods Co., supra, at page 553 of 180 F.; In re Lahongrais (C.C.A.) 5 F. (2d) 899, 901; French v. Long (C.C.A.) 42 F. (2d) 45, 47. And, generally, proceedings in bankruptcy are in the nature of proceedings in rem, adjudications of bankruptcy and orders of discharge being, as this court clearly has treated them, in every essential particular decrees in equity determining a status. Hanover National Bank v. Moyses, 186 U. S. 181, 192, 22 S. Ct. 857, 46 L. Ed. 1113; Commercial Bank of Manchester v. Buckner, 20 How. 108, 118, 119, 15 L. Ed. 862."

And that principle is not departed from by the Supreme Court in the *Lopereno, Pfister* and *Wayne* cases, as exemplified by the following statement in the *Pfister* case (317 U. S. 152):

> "Courts of bankruptcy are courts of equity without terms."

Jusino et al v. Morales, etc., supra, falls in the same category as *Safeway Stores, Inc. v. Coe,* supra, although that was a statutory action for unpaid

wages and was not controlled by rules of equity. Another distinguishing feature of the *Safeway* and *Jusino* cases is that there was not involved in either the question of rehearing an order in an administrative proceedings in equity, particularly with respect to orders awarding compensation to an attorney for petitioning creditors in a class suit in equity.

(j) *Lack of Diligence in Filing Petition.*

In view of the contention of appellant that the order of December 7, 1942 was placed under review by the trial court by entertaining the petition filed March 21, 1944, the question of lack of diligence is not involved because the order of December 7, 1942 is now appealable.

(k) *The Failure of the Court to Find the Facts Specially and State Separately Its Conclusions of Law Thereon as Provided by Rule 52 Does Not Make the Judgment Void.*

Appellant is not in disagreement with the contention of appellee under this subdivision of his brief.

Appellant's original petition for compensation placed before the trial court only the question of the amount of compensation he was entitled to receive as attorney for the petitioning creditors in the main suit. That petition was not traversed by the receiver. Testimony in support of his petition by able and experienced counsel, as well as the testimony of appellant himself, which was not contradicted by the receiver, presented for determination by the trial court only the amount of award to be made to appellant, measured by the extent of his services and the benefits received by the petitioning creditors, individually, and as a class.

CONCLUSION

Appellant has not attempted to analyze the many decisions cited in the brief of appellee, first, because time does not permit, and, secondly, because the fundamental principles of equity to be applied in the disposition of this cause on appeal are not generalized but are confined rather to these settled principles:

(a) The power of a trial court to review a final administrative order in equity where no intervening rights are affected is an inherent power in equity, and the trial court controlling such proceedings is authorized to correct an order manifestly erroneous.

(b) Entertainment of a petition to rehear an erroneous order awarding counsel fees in an administrative proceedings in equity not closed, reopens the order for appeal although the petition to rehear is filed out of time.

(c) Estoppel by satisfaction of judgment arising from equity is itself subject to equitable limitations in that one who receives the benefit of a judgment, which in all events is less than an amount to which one is justly entitled to receive, is not deprived of the right of appeal when the person asserting the estoppel is not injured, and where the invocation of estoppel unjustly enriches a receivership estate at the expense of the person sought to be estopped.

For all that has now been said, it is again respectfully prayed that the orders of the trial court appealed from be reversed and remanded with direction that the trial court order payment to appellant

from the receivership assets such sum as appears to this Court adequate for all the services rendered.

Respectfully submitted,

LESLIE C. HARDY,
Attorney for Appellant.

THOMAS W. NEALON,
In Propria Persona

No. 10961

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THOMAS W. NEALON,

Appellant,

vs.

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Appellee.

Upon Appeal From the District Court of the United States for the District of Arizona

Petition for Rehearing and Application for Stay of Mandate

LESLIE C. HARDY,
Attorney for Appellant

THOMAS W. NEALON,
In Propria Persona

McGREW'S COMMERCIAL PRINTERY

FILED
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RULES

Rules of Civil Procedure, Rule 60 (b) 2

No. 10961

United States
Circuit Court of Appeals
For the Ninth Circuit

THOMAS W. NEALON,

Appellant,

vs.

HARRY W. HILL, as Receiver of Intermountain Building & Loan Association, a corporation,

Appellee.

Petition for Rehearing

COMES NOW Thomas W. Nealon, appellant herein, and respectfully petitions this Honorable Court to reconsider its opinion filed herein on June 29, 1945, dismissing appellant's appeal, and to grant a rehearing of the decision and judgment dismissing the appeal, and in support thereof appellant respectfully represents:

I

Appellant respectfully asserts that the opinion of the court in this cause is erronous in that the court has incorrectly applied the rule of decision applicable to this cause as announced by the Supreme Court of the United States in the cases of *Wayne*

Gas Co. v. *Owens-Illinois Glass Co.,* 300 U. S. 131, *Bowman* v. *Loperena,* 311 U. S. 262, and *Pfister* v. *Northern Illinois Finance Corporation,* 317 U. S. 144.

Those decisions do not confine their application to bankruptcy proceedings, but, on the contrary, they apply a rule of equity to bankruptcy proceedings. Those decisions, in their application to bankruptcy proceedings, specifically decide that bankruptcy courts apply the doctrine of equity and that courts of bankruptcy are courts of equity without terms.

Local Loan Company v. *Hunt,* 292 U. S. 234

II

Appellant's petition filed March 31, 1944 to review and rehear the order entered December 7, 1942, was not too late because it was filed, as the opinion of this court recites, "after the expiration of the term at which the order was entered." Terms of court by Rule 6 (c) of the Rules of Civil Procedure are not controling.

Sprague v. *Ticonic National Bank,* 307 U. S. 169, note 9

III

The court, by its opinion, denominates this proceeding as "a civil action". Accordingly, Rule 60 (b) of the Rules of Civil Procedure, 28 USCA, following Section 723 (c), authorizes the entertainment of appellant's petition filed March 31, 1944. The exception (1) of that rule was directly invoked by appellant in this proceeding. Appellant asserts that the rule was devised to correct the error appearing on the record herein, especially in a receivership proceeding in equity not closed.

IV

For the reasons hereinabove set forth, appellant respectfully urges that the decision and judgment of this court, made and entered June 29, 1945, be reconsidered, and that a hearing thereof be granted.

Respectfully submitted,

LESLIE C. HARDY,
Attorney for Appellant

THOMAS W. NEALON,
In Propria Persona

No. 10961

United States
Circuit Court of Appeals
For the Ninth Circuit

THOMAS W. NEALON,

Appellant,

vs.

HARRY W. HILL, as Receiver of Intermountain Building & Loan Association, a corporation,

Appellee.

Application for Stay of Mandate

In the event the foregoing petition for rehearing is denied, appellant prays for a stay of the mandate herein and in support thereof respectfully represents to this Honorable Court, as follows:

Appellant, believing that the decision of his Honorable Court has decided an important question of federal practice which has not been but should be settled by the Supreme Court of the United States, and has decided a federal question in a way probably in conflict with decisions of the Supreme Court of the United States, does intend to petition the Supreme Court of the United States for review on writ of certiorari of the decision and judgment of this court filed in this cause on June 29, 1945.

Appellant represents that in the event the foregoing petition for rehearing is denied, he will promptly as possible thereafter file the petition for writ of certiorari in the Supreme Court of the United States, but that of necessity sufficient time will be required to secure from the clerk of this court the record to be filed in the Supreme Court of the United States in support of the petition for writ of certiorari, and also to prepare, print and file the petition for writ of certiorari and brief in support thereof. Appellant further represents that present printing facilities occasion delays which are not in other times encountered.

WHEREFORE, appellant requests this Honorable Court to stay the going down of the mandate herein for a sufficient and reasonable time after the decision and judgment of this court becomes final in order to permit appellant to file the petition for writ of certiorari, and the record in support thereof, in the Supreme Court of the United States.

Respectfully submitted,

LESLIE C. HARDY,
Attorney for Appellant

THOMAS W. NEALON,
In Propria Persona

CERTIFICATE OF GOOD FAITH

The undersigned attorneys, who are members of the bar of this court, and who are attorneys for the appellant herein, do hereby certify that the foregoing Petition for Rehearing and Applications for Stay of Mandate are based upon representations and contentions which they think are substantial, and

they do hereby further certify that they are not filed herein for the purpose of any delay but are filed herein by counsel in good faith.

LESLIE C. HARDY,
Attorney for Appellant

THOMAS W. NEALON,
In Propria Persona